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NOTES OF RECENT CASES.

Ramesam and Reilly, JJ., 8th July, 1924. } A. S. No. 18 of 1922.

Malabar Law—Will—Self-acquisitions — Karar *treating future acquisitions as* tavazhi *property—Suit challenging will—Maintainability—Cause of action.*

In a *Karar* entered into by the members of a Malabar *tavazhi*, one of the terms was that all property to be acquired thereafter by any of the parties thereto was to lapse to the *tavazhi*. Subsequently one of the parties to the *Karar* died leaving a will under which he bequeathed all the self-acquisitions he made after the date of the *Karar* to his sister and her children. In a suit filed against the latter by another party to the *Karar* for a declaration that the will was invalid and not binding, *held*, as according to the plaintiff's construction, the will amounted to an assertion of hostile title on the part of the testator, that by itself furnished a cause of action for the suit. 45 Cal. 510 (P. C.) ; 35 M. L. J. 144; 42 Mad. 699 followed.

T. S. Visvanatha Aiyar for Appellant.

B. Sitarama Rao for Respondents.

T. S. V.

Devadoss, J. 9th July, 1924. } S. A. No. 51 of 1922.

Specific performance—Minor—Guardian—Agreement to sell land—Necessary purpose—Subsequent payment of larger amount—Effect.

An agreement to sell land entered into by a Hindu guardian on behalf of a minor for a necessary purpose can be enforced in a suit for specific performance.

The fact that after a valid agreement to sell has been entered into, another person has paid a larger amount for the same land is no reason for refusing specific performance of the prior agreement. 42 Mad. 185 (F. B.) foll., 38 M. L. J. 77 dis. from 29 All. 213 Ref. to.

M. Patanjali Sastri for Appellant.

N. S. Srinivasa Iyer for Respondent.

T. S. V.

Devadoss, J.,
10th July, 1924. } S. A. No. 1339 of 1921.

Contract—Enforceability—Right of third parties—Rule and exception—Equity.

The ordinary rule of law that strangers to a contract cannot sue or be sued under it does not prevent a Court, in the exercise of its equitable jurisdiction, from passing a decree against a stranger when all the persons affected by the contract are parties to the suit. 36 E. R. 244; 41 Cal. 137; 36 I. C. 792 followed. 38 Mad. 753; 41 Mad. 488 (F. B.) ref. to.

K. Ramamurthi for Appellant.

K. Kameswara Rao for Respondents.

T. S. V.

Wallace and Jackson, JJ.
10th July, 1924. } C. M. A. No. 436 of 1922.

C. P. Code, O. 21, R. 16, Proviso 2—Applicability—Mortgage decree—Joint judgment-debtors—Transfer to one—Effect.

The second proviso to O. 21, R. 16, C. P. Code, applies only to a case where a money decree is passed against two or more persons. Where a mortgage decree is passed under O. 34, R. 5, against two mortgagors, and the mortgagee assigns the decree to one of them, there is no objection to his applying to have the transfer recognised with a view to execute the decree. 14 C. L. J. 639; 11 Cal. 393 foll. 40 Mad. 296; 43 M.L.J. 761; 28 Mad. 473 ref. to.

S. E. Sankara Aiyar for Appellant.

S. R. Dikshit for *T. R. Ramachandra Aiyar and Narasimhachariar* for Respondent.

T. S. V.

Wallace and Jackson, JJ. *11th July* 1924. } C. M. A. No. 403 of 1922:

C. P. Code, S. 135—*Exemption from arrest—Arrest under prior warrant—Attendance at Court—Nature of—Second arrest if legal—Appeal.*

S. 135, C. P. Code, does not exempt from arrest a person who is already under arrest in execution of another decree merely because at the time of the second arrest he is in the precincts of the Court or in the Court's custody but not in Jail. To be immune from arrest he must be attending court in pursuance of an order to attend court at that particular time.

There is nothing in Law which prohibits a second arrest while the first arrest is still in force.

An order refusing to set aside the second arrest is one relating to execution, and falls under S. 47, C. P. Code, and is hence appealable.

N. Swaminatha Iyer and S. Venkatrama Iyer for K. V. Krishnaswamy Iyer for Appellant.

K. Bhashyam Iyengar and K. Narasimha Iyengar for Respondent.

T. S. V.

Devadoss J, *14th July* 1924. } S. A. No. 113 of 1922.

Mortgage—Priority—Mortgage in satisfaction of decree—Prior mortgage—C. P. Code, S. 47—*Bar of suit.*

A person mortgaged his properties to A, who brought a suit thereon and obtained a decree for the satisfaction of which he executed a mortgage to C, after already creating a mortgage in favour of B. In a suit by C. against B, *held* (1) that C. was

entitled to priority over B, inasmuch as he had discharged a prior mortgage.

(1910) 2 Ch. 277; 1 Pat. 332 followed.

36 Cal. 290; 40 M. L. J. 114 ; 26 M. L. J. 74 distinguished.

(2) that S. 47 C. P. Code was not a bar to the suit brought by C.

24 M. L. J. 28 followed.

K. S. Sankara Iyer for the Advocate General for Appellant.

K. Bhashyam Iyengar for Respondent.

T. S. V.

Venkatasubba Rao J.
14th July 1924. } Crl. M. P. 326 of 1924.

Habeas Corpus—Writ of, when issued—Minor—Guardianship—Removal from.

In all cases of wrongful confinement, the aggrieved person whatever be his age, is entitled to apply for a writ of *Habeas Corpus*. In the case of minors if they are removed from the custody of their lawful guardian, the guardian can apply for the writ. Though the Court has jurisdiction to issue the writ on the application of the guardian, in the case of minors below 18, even against the minors' wishes, still in the case of a minor girl of 16 years the Court would consult the wishes and take into account the intelligent preference of the minor girl in deciding whether the writ should issue.

R. N. Aingar for Petitioner.

A. Krishnaswami Iyer for Respondent.

A. V. V.

Jackson, J.
14th July, 1924. } S. A. No. 455 of 1922.

C. P. Code, S. 100—*Libel action—Quantum of damages—Question of fact—Costs in criminal litigation—Not to be taken into account.*

The question of the amount of damages in a libel action is a question of fact and it is not open in second appeal to go into it. 32 M. L. J. 392 ; 31 All. 333, foll.

In estimating the quantum of damages, the costs incurred in a criminal litigation cannot be taken into consideration. 12 All. 166; 32 Cal. 429, foll.

T. Ramachandra Rao for Appellant.

K. Kameswara Rao for Respondents.

T. S. V.

Devadoss, J.
16th July, 1924. } S. A. No. 73 of 1922.

C. P. Code, O. 21, *R.* 63—*Costs incurred in attachment proceedings—Power of Court to order.*

Where at the instance of a claimant in execution proceedings a decree-holder's attachment is raised and the latter maintains successfully a suit under O. 21, R. 63, C. P. Code, declaring the validity of the attachment, the Court cannot by its decree award the costs incurred by him in the claim proceedings.

C. S. Venkatachari and *M. C. Sridharan* for Appellant.

K. P. M. Menon for Respondent.

T. S. V.

Devadoss, J.
16th July, 1924. } S. A. No. 279 of 1922.

Limitation Act, Art. 132—*Vendor's lien—Execution of registered debt bond by purchaser—Money payable on a third person attaining majority—Suit to enforce—Limitation.*

Where as consideration for the sale of immoveable property, the purchaser executed a registered debt bond under which the money was payable to the vendor on the attainment of majority by a third person and the vendor sued to enforce the bond by sale of the property, *held*, (1) that the vendor's lien was not lost by the execution of the registered bond in his favour; (2) that the limitation for the suit was that prescribed by Art. 132 of the Limitation Act; and (3) that time began to run from the date of the sale and not from the date of the attainment of majority by the person named in the bond.

K. Bhashyam and *P. J. Kuppanna Row* for Appellant.

N. Muthusami Iyer, for *T. V. Muthukrishna Iyer* for Respondent.

A. V. V.

Spencer and Srinivasa Iyengar, JJ. *16th July,* 1924.	A. S. No. 338 of 1921.

Succession Act, Ss. 82, 129 *and* 133—*Will—Construction—Specific legacies—Abatement.*

Where a testator by his will gives his immoveable property with all moveables in favour of one individual and also a legacy in favour of another directing that half the income of one of the items of immoveable property should be paid to the latter, and it was found that the testator was entitled only to one-half of that particular item of property, *held,* that both the legacies were specific, that they must abate in proportion and that each of the legatees took a quarter in the particular item of property.

T. R. Ramachandra Iyer, and *K. Y. Adiga* for Appellant.

B. Sitarama Row and *J. A. Pinto* for Respondents.

A. V. V.

Jackson, J.
21st July, 1924. } C. M. S. A. No. 81 of 1922.

C. P. Code, Ss. 47, 151 *and O.* 21, *R.* 90—*Second appeal—When lies—Order under inherent jurisdiction—Sale contrary to order of Court.*

Where an order setting aside an execution sale purports to be under S. 47 and O. 21, R. 90 there is no right of second appeal. But where though the application is put in under O. 21, R. 90, the Court sets aside the sale not on the ground of fraud or material irregularity, it is really an order under the inherent powers of the Court and a second appeal lies. 38 Cal. 339 foll.: 33 I. C. 694 distd.: 30 M. L. J. 611 approved: 27 M. L. J. 610 refd. to.

S. 47 only determines the forum and not the scope of the jurisdiction where the matter in execution is between parties to the suit. 3 Pat. 647 refd. to.

Where on an application by the judgment-debtor under O. 21, R. 90, the District Munsiff set aside the sale on the ground that it was in contravention of a prior order of Court regarding the order of sale of the items, *held*, a second appeal lay.

M. S. Venkatrama Aiyar and *S. Jagadisa Aiyar* for Appellant.

E. Vinayaka Rao for Respondent.

T. S. V.

Devadoss, J.
22nd July, 1924. } S. A. No. 14 of 1922.

Limitation Act, Art. 47—*Applicability—Proceedings under S.* 145, *Cr. P. Code—Effect of—Suit for possession—Limitation.*

Art. 47, Limitation Act, applies to a suit for possession of property which is actually in the possession of a person who has been successful in proceedings under S. 145, Cr. P. Code, or in the possession of a person claiming through him or by virtue of anything done by him. The shorter period of three years under Art. 47 cannot be extended and the Article made inapplicable by merely impleading as party defendants persons

not in possession at the time of the magisterial order. 6 C. L. R. 93 distd. : 25 Cal. 731 (F. B.) foll.

P. Somasundaram and *A. Satyanarayana* for Appellant.

T. Ramachandra Rao for Respondent.

T. S. V.

Wallace and Jackson, JJ.
10*th July*, 1924.

C. R. P. Nos. 26, 186 *and* 187 *of* 1924.

Election—Municipal Council—Preparation of electoral roll—Objections—Revising authority—Powers of—Finality of electoral roll—Objection petition in Court questioning validity of election—Madras District Municipalities Act (*V of* 1920)—*Rules framed under—Rule* 8 (*e*)—*Effect of.*

A candidate for election to a Municipal Council who had not been properly described in the preliminary electoral roll put in a claim petition to the revising authority to have his name corrected. The revising authority consisted of three persons, but only two of them attended and disposed of the claim petition by allowing the correction sought for. The candidate was eventually elected a Municipal Councillor. The defeated candidate at the election put in a petition in the Sub-Court alleging that the successful candidate was not properly on the rolls inasmuch as his petition had not been disposed of by a properly constituted revising authority. The Sub-Court held in favour of the petitioner and the successful candidate was unseated. *Held*, that under R. 8 (*e*) of the Rules for the Preparation of the Electoral Rolls, the electoral roll as ultimately published was final in election proceedings; that the elected candidate's name having rightly or wrongly appeared in the electoral roll, its legality cannot be questioned; and that the Court below erred in setting aside the election on that ground. The expression " election proceedings " in R. 8 (*e*) of the Rules is wide enough to cover an inquiry by the Court into the validity of an election.

Dr. S. Swaminadhan for *V. L. Ethiraj* for Petitioner.

T. R. Ramachandra Aiyar and S. Ramasami Dikshitar for Respondent.

A. V. V.

Wallace and Jackson, JJ.
17*th July*, 1924.
C. M. A. No. 381 *of* 1923.

Civil Procedure Code, S. 11—*Hindu widow—Alienation—Suit by reversioner for declaration of its invalidity—Death of widow—Subsequent suit for possession—Bar.*

Where a suit by the presumptive reversioner for a declaration that certain alienations of her husband's property by a Hindu widow were invalid beyond her life-time had been dismissed on the merits and after the death of the widow the actual reversioners brought a suit for possession of the same property, *held*, that the suit was barred under S. 11, C. P. Code, by reason of the decision in the prior suit which had been instituted by the then reversioner in a representative capacity. 38 M. 406 ; 41 M. 659 ; 44 A. 19 foll.

T. R. Ramachandra Aiyar and S. Ramaswami Dikshitar for Appellant.

B. Somayya for Respondent.

A. V. V.

The Offg. Chief Justice and Srinivasa Ayyangar, J.
22*nd July*, 1924.
A. S. No. 139 *of* 1921.

Provincial Insolvency Act (*III of* 1907), *Ss.* 2 (1) (*e*) *and* 16 —*Joint Hindu family—Father becoming insolvent—Effect of—Son's share if vests in Official Receiver—Adverse finding—Decree in favour of person*—Res judicata.

Where the father of a joint Hindu family is adjudicated insolvent, the entire family property including the shares of his sons vests in the Official Receiver, but in respect of the sons' shares the Receiver can exercise only such powers as the father himself could have exercised. 3 Lah. 329 ; 26 Mad. 214 ; 19 Mad. 74 ; 7 Bom. 441 ; C. M. A. 110 of 1919 foll. ; 46 Mad. 54 (F. B.) refd. to.

Where a suit is dismissed in favour of a party, an adverse finding against him is not *res judicata.* 48 Cal. 460 (P. C.) foll.

T. R. Ramachandra Aiyar and Srinivasa Aiyar for Appellants.

T. M. Krishnaswami Aiyar for Respondent.

T. S. V.

Devadoss, J.
22nd July, 1924. } *S. A. No.* 521 *of* 1923.

Madras Estates Land Act, Ss. 187, 24, 30 *and* 32—*Rent—Enhancement of—Agreement of parties—Validity—Intention of Legislature.*

Enhancement of rent by agreement of parties is not valid under S. 187 of the Estates Land Act. It can only be done by application as provided by the Act. Comparing S. 11 of the Rent Recovery Act with Ss. 24, 30 and 32 of the Estates Land Act, it is clear the intention of the legislature was to make all contracts for enhancement, even though they conferred additional advantages on the ryots, unenforceable.

B. Sita Rama Rao for Appellant.

A. C. Sampath Aiyangar for Respondent.

T. S. V.

Jackson, J.
23rd July, 1924. } *C. R. P. No.* 762 *of* 1922.

C. P. Code, O. 33, *R.* 3—*Presentation of application—If to be made to Judge—Presentation to Sheristadar if proper—Madras Civil Rules of Practice, R.* 14—*If* ultra vires.

O. 33, R. 3 simply insists on the pauper applicant appearing in person and not that he should present his application directly to the Judge. Hence the presentation of such an application to the Sheristadar of the Court is proper and the Court has no jurisdiction to reject it on that ground alone.

Rule 14 of the Madras Civil Rules of Practice is perfectly *ultra vires.*

P. V. Krishnaswami Aiyar for Petitioner.

K. Raja Aiyar and R. Ganapathi Aiyar for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ. } *Cr. R. C. No.* 767 *of* 1923.
21*st July*, 1924.

Cr. P. Code, Ss. 438 *and* 439—*Enhancement of sentence passed by Sessions Judge—Whether Dt. Magistrate competent to make reference in respect of such sentence.*

Where a person was convicted of an offence under S. 167, I. P. C., by a First Class Magistrate and the conviction and sentence were affirmed in appeal by the Sessions Judge, the District Magistrate made a reference to the High Court that the sentence was light and should be enhanced. On preliminary objection being taken that the District Magistrate was not competent to make such reference in respect of a sentence passed by the Sessions Judge,

Held, that the objection was well founded, that the District Magistrate was not competent to make such reference and that he should move the High Court through the proper channel. I.L.R. 5 L. 11 I.L.R. 23 Cal. 249 followed.

The Public Prosecutor for Petitioner.

A. Krishnaswami Iyer, B. Somayya and E. Krishnamurthi for Respondent (Accused).

C. A. S.

Reilly, J. } *C. R. P. No.* 935 *of* 1922.
21*st July*, 1924.

Indian Contract Act (*IX of* 1872), *S.* 39—*Vendor and vendee—Advance paid by vendee—Refusal of vendor to convey property—Vendee, if can put an end to the contract and claim refund of advance—Such a suit if cognisable by a Court of Small Causes—Provincial Small Causes Courts Act* (*IX of* 1887), *Sch. II, Art.* 15 *—Vendee if entitled to interest—Interest Act* (*XXXII of* 1839).

Where the vendee under a contract of sale of immoveable property advanced Rs. 85 to the vendor the same being the price and the vendor refused to convey the property, the vendee could put an end to the contract under S. 39 of the Indian Contract Act, 1872, and claim the refund of the advance paid by him. He is not bound to sue for specific performance and specific performance is not the only remedy open to him.

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Where, such a vendee sues to recover the advance paid by him, alleging an agreement by the vendor to repay the same to the vendee, the suit is not one for specific performance or rescission of a contract and is not excepted from the cognizance of a Court of Small Causes. 5 M. L. T. 296 and I. L. R. 11 Mad. 269 distinguished.

In such a suit for the recovery of the advance, the vendee is not entitled to interest by way of damages or under the Interest Act, 1839, in the absence of any agreement by the vendor to pay interest.

Watrap S. Subramania Iyer for Petitioner.

K. Bhashyam Iyengar for Respondent.

C. A. S.

Jackson, J.
23rd July, 1924. } *S. A. No. 212 of 1923.*

Transfer of Property Act, S. 52—Lispendens—Suit for specific performance—Decree satisfied by execution of private sale—Court sale pending decree—Sale by guardian without sanction of Court—Effect of, as against strangers.

A purchased certain properties subject to a mortgage. The mortgagee obtained a decree on his mortgage in execution of which the properties were sold and purchased by B. At the time of the purchase B. agreed to convey the property to A, but subsequently refused to perform his contract. A brought a suit for specific performance against B and his brother C, who claimed an interest in the property as being joint family property and obtained a decree. Pending the suit the property was sold in execution of a money decree against C and purchased by the defendant. The decree for specific performance was satisfied after the death of B by a conveyance executed by the guardian of B's minor sons in favour of A. In a suit for possession of the property by the plaintiff, a subsequent purchaser from A, as against the defendant, *held,* that the purchase by the defendant was affected by the doctrine of lispendens inasmuch as A's suit for specific performance was pending at the time of the Court sale; that the fact that the decree in the suit for specific performance was satisfied by the execution of a

private conveyance did not make any difference; and that the title of the plaintiff's vendor, A. under the conveyance by the guardian of B's minor sons, though subject to be defeated by the minors for want of the Court's sanction for the same, was still valid as against the rest of the world including the defendant.

T. M. Krishnaswami Iyer and K. S. Desikan for Appellant.

K. Bhashyam for Respondent.

A. V. V.

The Offg. Chief Justice. *24th July,* 1924.	*Cr. R. C. No.* 472 *of* 1924.

Cr. P. Code, S. 162—Inquest report—Grant of copies to accused—Duty of Magistrate.

Where a Presidency Magistrate after holding a preliminary inquiry commits an accused to the High Court Sessions for an offence under S. 302, I. P. C., the accused is entitled to get a copy of the statements made by witnesses at the inquest. If the report was not in the custody of the Court, the Magistrate could call for its production by the Police under S. 94, Cr. P. Code.

K. U. Shama Rao for the Petitioner.

The Crown Prosecutor (*K. P. M. Menon*) for the Crown.

T. S. V.

Jackson, J. *25th July,* 1924.	*Cr. R. C. No.* 672 *of* 1923.

Penal Code, S. 486—Counterfeit trade-mark—General resemblance to tiles of complainant—Similar elephant mark—Company's name different—Effect.

In a complaint under S. 480, I. P. C., it was alleged that the accused was selling tiles with an elephant mark which was the trade-mark of the tiles manufactured by the complainants, Harrison and Crossfield. The accused pleaded and proved that though the elephant mark was there in the tiles sold by them,

they also contained the name of the manufacturers "Empire Company" and as such the offence under S. 486, I. P. C., had not been committed. *Held*, in India the general purchaser being illiterate, he goes by the trade-mark and the fact the name of the manufacturer was on the tiles does not make it any the less an offence. (1908) 1 Ir. Rep. 43 distd.

F. S. Vaz for Petitioner.

V. L. Ethiraj for Complainant.

T. S. V.

The Offg. Chief Justice and Kumaraswami Sastri, J.
28th July, 1924.

**C. M. P. No.* 1018 *of* 1924.

C. P. Code, S. 110, *cl.* (2)—*Suit in ejectment and for mesne profits—Plea of occupancy rights—Darmilla minor inam—Value of land with mesne profits—Value of subject-matter.*

In a suit for ejectment and mesne profits, the defendants pleaded occupancy rights on the footing the suit land was an estate, and plaintiff, a darmilla minor inamdar a landholder as held in I. L. R. 45 Mad. 716 (F.B.). The plea of the defendants was upheld in all the Courts. On an application by plaintiff for leave to appeal to His Majesty in Council, *held*, though the value of the subject-matter of the suit was below Rs. 10,000, Clause 2 of S. 110, C. P. C., applied as the value of the land with mesne profits up to date of application for leave to appeal exceeded Rs. 10,000. I. L. R. 33 Cal. 1286 and I.L.R. 44 Cal. 119 folld I.L.R. 39 Mad. 843=30 M.L.J. 117 not folld.; apparent conflict between 30 M. L. J. 117 and 32 M. L. T. 101 pointed out.

V. Ramadas for Petitioner.

V. Suryanarayana for Respondent.

T. S. V.

Wallace and Jackson, JJ.
9th July, 1924. } *C. M. A. No.* 352 *of* 1923.

Provincial Insolvency Act (*V of* 1920), *S.* 24—*Departure from house or place of business—Adjudication order—Date for hearing —Absence of insolvent—Effect.*

Where an insolvency petition merely stated that the respondent was departing from his dwelling-house or usual place of business, but there was no allegation that he was doing it with intent to defeat or delay his creditors, an order of adjudication based thereon is illegal. The District Judge has no power to adjudge a person insolvent merely because he was not present on the day fixed for hearing, as S. 24, Provincial Insolvency Act, requires proof of certain matters before passing an order of adjudication.

Ch. Raghava Rao for Appellant.

T. Ramachandra Rao for Respondent.

T. S. V.

Jackson, J.
28th July, 1924. } *S. A. No.* 158 *of* 1922.

Contract Act, S. 74—*Penalty—Question of law—Partition among brothers—Annuity in lieu of share—On default, regular share to be given—Relief against.*

The question whether a particular provision amounts to a penalty under S. 74, Contract Act, is one of law and depends on the facts of each case.

In a partition among brothers, one of them agreed to take an annuity in lieu of his share. There was a further clause that if the other failed to pay the annuity regularly, he would become liable to pay the share he would have taken on a regular partition. On default occurring, a suit was brought for his proper share of the inheritance. *Held*, the stipulation in the earlier part being in the nature of a conditional concession, there was no question of penalty, and hence effect was to be given to the document in full. 1 Russel and Mylne 506; 2 I. C. 850; 48 Cal. 1036 folld.; 36 Mad. 229 refd. to.

T. L. Venkatrama Aiyar for Appellant.

C. Narasimhachari for Respondent,

T. S. V.

N R C

Jackson, J.
28th July, 1924. } *C. M. S. A. No.* 114 *of* 1922.

Civil Procedure Code, O. 34, *R.* 14—*Mortgage and lease back —Suit on lease for arrears of rent—Sale of equity of redemption— If valid—Prior order for sale—Failure to object—Estoppel.*

A usufructuary mortgage and a lease back were executed on the same date. The mortgagee obtained a decree for arrears of rent due under the lease and sought to bring to sale the equity of redemption. The mortgagor (judgment-debtor) objected that the sale would contravene O. 34, R. 14 whereupon the mortgagee decree-holder relied upon an estoppel arising from the fact that in a prior execution application an order for sale was passed without any such objection being raised.

Held, (1) the mortgage and the lease back formed a single transaction ;

(2) the decree for arrears was on a claim arising under the mortgage and hence the sale of the equity of redemption would fall within the mischief of O. 34, R. 14, Civil Procedure Code. 44 Bom. 366 ; 45 Bom. 174 ; 35 Cal. 61 ; 41 All. 399 folld. ; and

(3) the judgment-debtor was not estopped from raising the contention as the sale would be in contravention of a statutory bar which the Court was bound to act upon even *suo motu.* 45 Cal. 830 referred to.

K. P. M. Menon for Appellant.

T. A. Ananta Aiyar for Respondent.

T. S. V.

Offg. Chief Justice and
Ramesam, J.
29th July, 1924. } *C. M. A. No.* 312 *of* 1922.

Insolvency—Adjudication—Act of insolvency—Transfer of property in trust for creditors—Assent of creditors—Effect of.

Where a debtor transferred all his properties in trust for his creditors and the creditors assented to the transaction, some before and some after the transfer, it is not open to any of them

to rely on the transfer as an act of bankruptcy and base a petition for adjudication of the debtor.

A. Krishnaswami Aiyar for Appellant.

T. M. Krishnaswami Iyer and *K. Narasimha Iyengar* for Respondent.

A. V. V.

Wallace and Madhavan Nair, JJ.
29th July, 1924.

C. M. A. No. 382 *of* 1922.

Civil Procedure Code, S. 151 *and* O. 41, *R.* 23—*Order of remand—Inherent power—Powers of Court—Order if appealable.*

Apart from O. 41, R. 23, Civil Procedure Code, a Court has an inherent power to remand a case under certain circumstances and no appeal lies from such an order. 37 M. L. J. 536; 73 I.C. 915 folld. ; 17 L. W. 159 distd. ; 45 Mad. 900 (F. B.) refd. to.

K. Subba Rao for *V. Ramdoss* for Appellant.

K. Raja Aiyar for Respondent.

T. S. V.

Kumaraswami Sastri, J.
29th July, 1924.

In the matter of the Income-tax Act and the Specific Relief Act.

Income-tax Act (*II of* 1922), *Ss.* 31, 32 *and* 66—*Levy of income-tax—Guaranteed profits of* Nidhi—*Subsequent decision of High Court that profits not taxable—Application for refund—Refusal—Application to High Court to order Commissioner to state case—Maintainability.*

The Income-tax authorities levied income-tax on the guaranteed profits of a certain *nidhi.* Subsequently the High Court in another case (that of the Mylapore Hindu Permanent Fund) held such profits were not liable to tax, whereupon the *nidhi* applied for refund. The same was disallowed by the Income-tax authorities, and an application was put in the High Court to direct the Commissioner of Income-tax to state a case to the High Court. *Held,* on a construction of Ss. 31, 32 and 66 of the Income-tax Act, the proper stage at which to make such an application was when the appeal against the assessment

was dismissed and the present petition was not maintainable and was also barred by time.

B. C. Sankaranarayana for Assessee.

The Government Pleader (*C. V. Anantakrishna Aiyar*) for the Commissioner.

T. S. V.

Wallace and Madhavan Nair, JJ.
31*st July*, 1924. } *C. M. A. No.* 157 *of* 1924.

Civil Procedure Code, O. 21, *R.* 66—*Order fixing sale proclamation—Nature of—Appeal.*

An order under O. 21, R. 66 fixing the sale proclamation is of an administrative nature and is not appealable. 27 Mad. 259 (F. B.) ; 45 M. L. J. 611, folld.

E. L. Thornton and *K. P. Rama Menon* for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

T. S. V.

Jackson, J.
1*st August*, 1924. } *S. A. No.* 471 *of* 1922.

Hindu Law—Inheritance—Daughters—Division inter se—*Rights of survivorship.*

A Hindu died leaving three daughters. They divided his properties into three shares under an arrangement that each was to enjoy her share as she liked with absolute rights. After the death of two of the daughters, the third claimed the properties allotted to them on the basis of survivorship. *Held*, the arrangement amounted to a relinquishment of the right of survivorship. 28 M. L. J. 685 ; 46 M. L. J. 285 folld. ; 14 M. L. J. 175 distd.

V. Suryanarayana for Appellants.

V. Ramdoss and *N. Rama Rao* for Respondents.

T. S. V.

Jackson, J.
1st August, 1924. } *S. A. No.* 7 *of* 1922.

Malabar Law—Nambudiris—*Law governing—Hindu Law—If affected by customary law—Burden of proof*—Antarjenom—*Position in illom.*

The *Nambudiris* of Malabar are governed by Hindu Law and the onus is on the party who sets up that since the date of settling down in Malabar they have assimilated the customary law of Malabar to set up and prove definitely such custom.

An *antarjenom* of an illom which consists solely of her husband who is an idiot and his two minor sons by another wife cannot effect a valid mortgage which would be binding on the minors. 12 M. L. J. 180 (Journal portion), 11 Mad. 157 34 Mad. 496 folld.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Appellants.

K. P. M. Menon for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
4th August, 1924. } *Cr. Appeal No.* 1107 *of* 1923.

Penal Code, S. 188—*Giving false information — Transfer application—Affidavit containing false allegations against Magistrate—If amounts to information against public servant.*

An application for transfer of a criminal case was supported by the affidavit of a person who alleged therein that the Magistrate in the course of the proceedings insulted the complainant. The allegation was found to be false and the deponent was charged with an offence under S. 188, I. P. C. *Held*, the affidavit did not amount to information given to a public servant under the section.

The Public Prosecutor for the Crown.

V. Ramadoss for the Accused.

T. S. V.

N R C

Devadoss and Jackson, JJ. 5th August, 1924. } S. A. No. 81 of 1922.

Appeal—Decree in favour of party—Adverse finding—Jurisdiction of Court to entertain appeal.

Where a decree is in favour of a party, but the judgment contains a finding adverse to him, an appellate Court has no jurisdiction to entertain an appeal against the decree at his instance, unless the finding is expressly or by necessary implication embodied in the decree. 37 Mad. 25 ; 17 M. L. T. 85 ; 4 Mad. 134 folld.; 30 Mad. 447 ; 25 M. L. J. 379 distd.; 34 M. L. J. 431 refd. to.

Ch. Raghava Rao for Appellant.

C. Sambasiva Rao for Respondents.

T. S. V.

Devadoss and Jackson, JJ. 6th August, 1924. } S. A. No. 343 of 1922.

Hindu Law—Partition—Partial partition—Suit for—Maintainability—Limits of principle—Tenants in common.

A suit for partial partition does not ordinarily lie, but under special circumstances such as where some properties are in the hands of third parties claiming adversely to the tenants in common, or where one property had been alienated by one of the co-sharers and there is some difficulty in impleading the alienee in the suit, the Court will not insist on such property being made the subject-matter of the suit. 37 C. L. J. 191 ; 46 Mad. 844 folld.

K. Kameswara Rao for Appellant.

E. Krishnamurthy for *B. Somayya* for Respondent.

T. S. V.

The Offg. Chief Justice and Srinivasa Iyengar, J. 6th August, 1924. } A. S. No. 9 of 1923.

Limitation Act, Arts. 64, 116 and 120—One document contemplating execution of another document—Decree of Court—Suit

on decree—Whether lies—Limitation—Decree—Construction—If declaratory or executable.

In the course of a suit, the parties entered into a registered agreement which, amongst other terms, stated "the accounts should be looked into and settled within three months from now * * * Razinama should be filed in Court stating the above terms," and in pursuance of the terms, a decree was passed. In a subsequent suit brought for the enforcement of the reliefs based on the registered agreement and the decree in the prior suit, the questions arose whether a separate suit would lie or whether the remedy was only in execution, and, if a suit lay, what was the period of limitation for the institution of the suit.

Held, that the decree in the previous suit was only declaratory and not executable and therefore a suit lay.

Held, also that Art. 116 of the Limitation Act could not apply because the registered agreement contemplated that the terms of the agreement should be embodied in a decree and made a rule of Court and the agreement therefore became merged in the decree.

Per Spencer, O. C. J. :—Art. 120 being only a residuary article does not apply but only Art. 64.

Per Srinivasa Iyengar, J :—The proper article is 120 and not 64.

(1923) A. C. 48 ; 27 M. 243 (F. B.) referred to.

K. V. Krishnaswami Iyer and *V. Rajagopala Iyer* for Appellants.

S. Sundararaja Iyengar and *A. Krishnaswami Iyer* for Respondents.

T. S. V.

Jackson, J. *8th August*, 1924.	*C. M. S. A. No.* 25 of 1923.

Limitation Act, Art. 182 (5)—*Execution petition—Return for amendment—Not re-presented—If extends limitation—Petition rejected as barred—If step-in-aid.*

An execution petition returned for amendment but not afterwards re-presented is sufficient to save limitation. 32 I. C. 691, 816 ; 2 L. W. 540 folld. If such a petition is re-pre-

sented but is afterwards rejected as out of time, it amounts to a step-in-aid of execution.

S. Natesa Sastry for Appellant.

A. Srinivasa Aiyangar for *A. Suryanarayaniah* for Respondent.

T. S. V.

Wallace and Jackson, JJ.
8th August, 1924.
C. M. A. No. 340 *of* 1923.

Civil Procedure Code, S. 105—*Affecting the decision of the case—Meaning of—Order setting aside* ex parte *decree—Propriety of—If open to attack in appeal.*

An *ex parte* preliminary mortgage decree was followed by an *ex parte* final decree ; the mortgagor got the latter alone set aside and then set up a successful plea of limitation to the passing of a fresh final decree. In an appeal from the decree the mortgagee sought to attack the correctness of the order setting aside the *ex parte* final decree on the ground that the application to set aside the decree was itself barred by limitation. *Held,* the order was one "affecting the decision of the case" within the meaning of S. 105, C. P. C., and hence could be challenged in appeal.

The view taken by the Calcutta, Allahabad and Lahore High Courts in 22 Cal. 981 ; 24 All. 4..4 ; 25 All. 280 ; 31 I. C. 914 ; 599 I. C. 676 ; 72 I. C. 410, etc., that the expression "affecting the decision of the case" means "affecting the decision of the case on the merits" does not mean to lay down that in no case can the propriety of an order setting aside an *ex parte* decree be questioned in an appeal from the decree. Though no injustice can result when a decision is given on the merits, cases do arise as in 26 Mad. 604; 34 All. 592, and in the present case, where the propriety of the order should be allowed to be questioned.

K. Rajah Aiyar and *N. Panchapakesa Aiyar* for Appellant.

K. S Jayarama Aiyar for Respondent.

T. S. V.

Wallace and Jackson, JJ.
8th August, 1924.
Cr. Appeal No. 101 *of* 1924.

Criminal Procedure Code, S. 357—*Rules framed under—Sessions Judge—Evidence of witness recorded by typist—Irregularity—Prejudice to accused.*

•Where in contravention of a Government Notification under S. 357, Cr P. Code, a Sessions Judge, instead of taking down the evidence of witnesses with his own hand, got it taken down by a clerk with the aid of a typewriter, the procedure is irregular but the accused cannot be said to be prejudiced by the same.

Dr. S. Swaminathan and *C. Sambasiva Rao* for Appellants.
The Public Prosecutor (*J. C. Adam*) for the Crown.
T. S. V.

Madhavan Nair, J.
13*th August,* 1924.
S. A. No. 55 *of* 1922.

Evidence Act, S. 108—*Date of death—Presumption regarding—Person missing for* 25 *years.*

In a suit wherein the validity of a will was in question, it was found that the only other person who was jointly entitled to the properties comprised in the will along with the testator had not been heard of since 1892, *i.e.*, for a period of 25 years, prior to the institution of the suit, *held,* following the principle of *Rust* v. *Baker,* 59 F. R. 176 and 41 M. L. J. 295 that at the end of 7 years, *i. e.*, from 1899, the presumption of death arose and the burden is on the party who challenges the will to prove he died at some later date.

A. Krishnaswami Aiyar and *A. Venkatachalam* for Appellant.
V. Krishna Mohan and *B. Bapiraju* for Respondent.
T. S. V.

Waller, J.
13*th August,* 1924
C. S. No. 9 *of* 1923.

Shipping—Charterparty—Frustration of adventure—Failure to obtain license from Government—Implied condition—Damages—Suit for.

A contract of Charterparty was entered into in December, 1919, between the defendants and the plaintiffs who were native craftowners for shipping foodstuffs from Burma to India during January and March, 1920. At that time foodstuffs could not be exported from Burma without a special license from the Government, but the defendants were one of the firms usually getting special license. The Charterparty did not contain any terms as to obtaining of license, but was an unconditional contract for the supply of cargo. In January, 1920, the Government prohibited shipping by native crafts and as no foodstuffs were shipped, plaintiffs sued for damages for breach of contract. *Held,* the conditions of trade existing at that time being well known to the parties, the breach caused by the defendant was due to the prohibition by the Government and an implied condition should be imported into the terms of the Charterparty that it was only in case the Government issued the necessary license that the Charterparty was to be given effect to. The matter would be governed by the principles laid down in the cases dealing with "frustration of adventure."

(1903) 2 K. B. 740 ; (1921) 2 Ch. 379 ; (1919) A. C. 435; (1918) A. C. 119 followed.

C. *Rama Rao* for Plaintiff.

K. *Sundara Rao* and *T. Appaji Rao* for Defendants.

T. S. V.

Ramesam and Reilly, JJ.
15*th August,* 1924. } *A. S. No.* 368 *of* 1921.

Hindu Law—Reversioners—Guardian of minor—Powers of —Estoppel—Surrender—When valid.

The guardian of a minor reversioner has no right to deal with the reversionary rights of his ward. 45 Cal. 590 and 24 All. 103 folld. A reversioner by acts such as attesting to a sale of the estate is not estopped from claiming the estate when succession opens.

Under Hindu Law for an effective surrender, two conditions alone are necessary ; first, there must be the self-effacement of the widow ; and secondly, the next reversioner must

get the estate, 42 Mad. 523 ; 47 Cal. 466 folld. ; 48 Cal. 100 distd. Where there has been a self-effacement, but the estate is given in portion to each of the reversioners, there is no valid surrender. 34 M. L. J. 229 and 41 M. L. J. 208 distd.

The withdrawal of a suit for possession by a reversioner does not bar a suit by other reversioners when the succession opens. (1921) M. W. N. 342 distd.; 33 M. L. J. 471 ; 39 Mad. 987 folld.

The Advocate-General (*T. R. Venkatrama Sastry*) and *M. S. Venkatrama Aiyar* for Appellant.

T. R. Ramachandra Aiyar, N. A. Krishna Aiyar and *P. J. Kuppanna Rao* for Respondents.

T. S. V.

Madhavan Nair, J.
15th August, 1924. } *S. A. No.* 1327 *of* 1921.

Civil Procedure Code, S. 47—Bar of suit—Parties—Meaning of—If applicable to judgment-debtors inter se.

In a suit for specific performance of a contract to sell, a decree was passed against the vendor and a subsequent vendee directing them jointly or the latter alone to execute a conveyance and get the balance of purchase money from the plaintiff. The plaintiff deposited the money in Court. When the question of disposing of the money arose, the Court interpreted the decree to mean that the subsequent vendee alone was to receive the money and execute the conveyance, overruling the vendor's objections. The vendor did not appeal against the order but brought a suit to recover the money from the vendee. *Held,* the suit was not maintainable, as S. 47 was a bar. The word "parties" in that section does not necessarily mean parties arrayed as plaintiff and defendant, but the section applies to matters arising between judgment-debtors *inter se* provided the decree-holder is interested in the dispute.

V. Ramdoss for Appellant.

K. Kameswara Rao for Respondent.

T. S. V.

The Offg. Chief Justice & Srinivasa Aiyangar, J.
18th August, 1924.

O. S. A. No. 62 *of* 1923.

Company—Winding up—Creditor claiming under mortgage—Debt disputed—Petition if maintainable.

A creditor of a Company alleging that the whole stock in trade had been mortgaged to him by some of the Directors applied to the High Court for winding up the Company. Later, two suits were filed, one by the Company for a declaration that the mortgage was not binding on it, and another by the creditor to enforce his rights under the mortgage. *Held,* as the debt itself was disputed by the Company and in the absence of evidence of insolvency, the petition for winding up was not maintainable.

17 Equity 445 ; 39 Bom. 47 at pp. 51 and 52 folld.

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar* for Appellant.

A. Krishnaswami Aiyar and *K. Kameswara Rao* for Respondent.

T. S. V.

Madhavan Nair, J.
18th August, 1924.

C. R. P. No. 117 *of* 1924.

Civil Procedure Code, O. 33, *R.* 15—*Application for leave to sue* in forma pauperis—*Notice to other party—Dismissal for default—Effect—If bars subsequent application on same cause of action.*

On an application for leave to sue *in forma pauperis* notice was ordered to the opposite side and subsequently the petition was dismissed for default. Later on, a second petition was put in for leave to sue as a pauper, based on the same cause of action. *Held,* O. 33, R. 15, C. P. Code, did not bar the application, as the dismissal for default on the prior occasion does not amount to a "refusal" within the meaning of the rule. 20 Bom. 86 ; 52 I. C. 562; 20 C. W. N. 669 ; 2 Bur. L. J. 217 considered.

S. Panchapakesa Sastry for Petitioner.

S. E. Sankara Aiyar for Respondent.

T. S. V.

Madhavan Nair and Jackson, JJ. 18*th August*, 1924. } *C. M. A. No.* 64 *of* 1924.

Provincial Insolvency Act (*V of* 1920), *S.* 5 (1)—*Insolvency Court—Power of, to grant interim protection prior to adjudication.*

In an appeal against an order of the District Judge refusing to grant interim protection prior to adjudication, objection was taken by the respondent on the ground that the District Court had no jurisdiction to make such an order for want of a provision therefor in the new Provincial Insolvency Act of 1920 and 46 M. L. J. (Notes of Recent Cases) 83 was relied on. *Held,* overruling the contention, that the District Court had the power to grant interim protection prior to adjudication under S. 5 (1) of the Act. 14 C. W. N. 586 followed.

Watrap S. Subramania Aiyar for Appellant.

Dr. T. C. K. Kurup for Respondent.

C. A. S.

Ramesam and Reilly, JJ. 19*th August*, 1924. } *A. S. No.* 96 *of* 1923.

Contract—Breach—Suit for damages—Rejection of goods on specific ground—Vendee if can support his action on other grounds.

Quaere: Whether the principle of law laid down in *Braithwaite* v. *Foreign Hardwood Co.* (1905) 2 K. B. 543, *i. e.*, that a vendee who under a contract of sale rejects the goods sent to him on a particular ground, *e.g.*, that they are not of the same quality as the goods ordered, cannot afterwards in a suit support his act on any other ground, is good law in view of the observations of the House of Lords in 1923 A.C. 48 ?

M. Patanjali Sastry for *A. Krishnaswami Aiyar* for Appellant.

C. V. Anantakrishna Aiyar for Respondent.

T. S. V.

Beasley, J.
19th August, 1924. } *Cr. Rev. Case No.* 580 *of* 1923.

Criminal Procedure Code, Ss. 145 *and* 523—*Crops taken possession of by Court—Dropping of proceedings—Order directing return to one of the parties—Propriety of—Procedure.*

During the pendency of proceedings under S. 145, Cr. P. Code, between parties claiming to be landholder and tenant, the crops on the land were taken possession of by the Police, and later on sold and the sale proceeds deposited in Court. The proceedings under S 145 were later on dropped with the consent of both parties, and subsequently the Court purporting to act under S.523 ordered the proceeds to be paid to one party. *Held*, the order was illegal inasmuch as it would amount to a determination of the very question which was left undecided when proceedings were dropped. The proper order in such a case would be to keep the amount in Court till the rights of parties were adjudicated on in a proper suit.

F. S. Vaz (with him *T. S. Viswanatha Aiyar*) for Petitioner.

The Public Prosecutor (*J. C. Adam*) for the Crown.

K. V. Sesha Aiyangar and *R. V. Seshagiri Rao* for Respondents.

T. S. V.

Waller, J.
19*th August*, 1924. } *C. S. No.* 269 *of* 1923.

Madras District Municipalities Act (*V of* 1920), *Ss.* 92, 350 *and Sch. IV, R.* 16—*Tax on companies—Basis of calculation—Rule* 16 *and proviso—Applicability—Suit for refund and declaration of liability—Maintainability—Limitation Act, Art.* 62.

The Chairman of a Municipality assessed and levied as " tax on companies " Rs. 125 per half year from a certain company, basing the assessment on the gross income according to the proviso to R. 16 of Sch. IV of the Madras District Municipalities Act, as he found that the company was doing business through an agent only and had no head office or a branch or principal office within the Municipality. The company sued

the Municipality for a declaration that the basis of taxation was the paid-up capital under R. 16 and for refund of the extra amounts paid. The Municipality pleaded in defence that the Chairman's assessment was proper, that the suit was barred as it was not brought within the special period of six months under S. 350 of the Act and also that the suit was not maintainable as the assessment had been made according to the Act.

Held, (1) reading R. 16 of Sch. IV with S. 92 of the Act, the primary basis of assessment as regards companies is the paid-up capital and the proviso to R. 16 being intended as a benefit and relief to companies should not be so construed as to inflict a penalty

(2) the suit not being one for damages or compensation as contemplated by S. 350, the special period of limitation fixed therein would not apply, but the case would fall under Art. 62 Limitation Act ; and

(3) the assessment having been made on a wrong basis, was not in compliance with law and hence illegal, and therefore a suit was maintainable.

Vere Mockett instructed by *Short* and *Bewes* for Plaintiffs.

G. Lakshmanna and *P. Satyanarayana* for Defendant.

T. S. V.

Ramesam and Reilly, JJ.
21st August, 1924.
A. S. No. 140 *of* 1923.

Madras Regulation X of 1831, *S.* 2.—*Applicability*—"*Inheritance*" *if includes survivorship*—*Madras Revenue Recovery Act* (*II of* 1864), *S.* 63—*Scope of*—*Minor's estates*—*Sale for arrears of revenue*—*Suit to set aside.*

The purchaser at an auction sale of a whole *shrotriem* village sold the same and it ultimately became the property of a joint Hindu family consisting of a father and his minor son. The father died and by survivorship the son became sole owner. While he was still a minor and under the guardianship of his mother, the village was sold for arrears of Government revenue which had accrued due. The son, after attaining majority, sued to recover the same from the purchaser on the ground that

under S 2 of Reg. X of 1831 the sale of a minor's property for arrears of revenue was void. It was pleaded in defence that the Regulation applied only to estates which minors got "by regular course of inheritance" and not to a case of survivorship; and that even otherwise S. 63 of the Madras Revenue Recovery Act which saved the operation of Reg. X of 1831 limited it only to minors who are landholders, *i. e.*, minors who are not merely owners of land but are registered as such in the Government registers.

Held, (1) "inheritance" is used in S. 2 of Reg. X of 1831 in the general sense of taking and includes a case of survivorship.

(2) S. 63, Revenue Recovery Act, does not limit the applicability of Regulation X of 1831, and to hold otherwise would render the decision in 41 Mad. 733 (F. B.) incorrect; 26 Mad. 385 13 M. L. J. 129 referred to.

K. V. Krishnaswamy Aiyar for *A. Krishnaswamy Aiyar* for Appellant.

S. T. Srinivasagopalachari for Respondent.

T. S. V.

The Offg. Chief Justice, Devadoss and Srinivasa Aiyangar, JJ.
26th August, 1924.

O. S. A. No. 6 *of* 1924.

Vakils—Right of audience—Insolvency side of the Madras High Court.

Held per curiam Vakils have no right of audience on the Insolvency side of the Madras High Court.

G. Krishnaswami Aiyar for Appellant.

A. Krishnaswami Aiyar for the Vakils' Association.

Nugent Grant for the Attorneys' Association.

T. S. V.

Srinivasa Aiyangar, J.
19th August, 1924. } *C. R. P. No.* 105 *of* 1923.

Hindu Law—Joint family—Suit against manager and junior members—Compromise with manager—Effect.

. Pending a suit for accounts against the managing member of a Hindu family and the junior members thereof, the manager filed a criminal complaint against the plaintiff for assault. The latter was compounded on condition the civil suit was to be withdrawn. *Held,* the suit cannot be continued against the junior members alone, as the original cause of action was against the joint family. A valid discharge in favour of the manager enures to the benefit of all the members.

P. V. Krishnaswami Aiyar for Petitioner.

T. M. Ramaswamy Aiyar for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
22nd August, 1924. } *S. A. No.* 88 *of* 1922.

Transfer of Property Act, S. 91 *(f)—Money decree-holder—Attachment and sale of property—Purchase by decree-holder—Right to redeem prior mortgage—Civil Procedure Code, O.* 34, *R.* 1 *and O.* 41, *R.* 33—*" Having an interest in the right of redemption"—Purchaser if falls under—Scope of O.* 41, *R.* 33.

The plaintiff who had a money decree against a certain person attached and sold a property of his debtor and purchased the same himself. Meanwhile the defendant who had a mortgage over the same property brought a suit on the mortgage without impleading the plaintiff, obtained a decree for sale and became the purchaser. The plaintiff then sued the defendant for redemption, on the ground the mortgage decree obtained by the latter was not binding on him, as he had not been impleaded in the suit. The first Court granted him a decree for redemption on payment of a certain amount. The defendant did not appeal, but the plaintiff appealed regarding the amount fixed for redemption. The appellate Court acting under O. 41, R. 33 dismissed the whole suit on the ground the plaintiff was not entitled to redeem.

Held, (1) though under S. 91 (*f*), Transfer of Property Act, an attaching creditor is entitled to redeem, the plaintiff by purchasing the property in auction sale has shed off the character of judgment-creditor and hence was not entitled to redeem, 44 Mad. 232 folld.; the right to redeem must subsist on the date of the suit and the mere fact that at the time of the defendant's suit he was only an attaching creditor will not suffice ;

(2) the words "having an interest in the mortgage security or in the right of redemption" in O. 34, R. 1 cannot include a person who has a mere statutory right to redeem under S. 91 (*f*), T. P. Act, as they refer to an interest in the estate itself, 37 Mad. 418 not followed ; and

(3) the lower appellate Court was right in acting under O. 41, R. 33 and dismissing the whole suit. A Court should exercise judicial discretion in acting under O. 41, R. 33, but its power is not to be read as limited by O. 41, R. 22. Scope of power discussed, 8 I. C. 337 dissented from ; 34 All. 32 distd.; 43 All. 85 ; 24 C. W. N. 110 ; 17 L. W. 272 ; 29 I. C. 579 ; 27 I. C. 336 referred to.

T. L. Venkatrama Aiyar for Appellant.

P. R. Srinivasan for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
26th August, 1924. } *S. A. No.* 376 *of* 1922.

Contract Act, S. 74, *Ills.* (*f*) *and* (*g*)—*Chit fund—Default in paying instalments—Clause making whole payable—Penalty.*

In an agreement relating to a chit fund, there was a clause to the effect that if default was made in the payment of any of the instalments within a certain time, the whole amount was to become payable at once. *Held*, the clause amounted to a penalty.

Scope of illustrations (*f*) and (*g*) to S. 74 considered. 5 A. C. 685 ; 9 I. C. 196 ; 36 Mad. 229 (F. B.) considered ; 14 M. L. J. 136 ; 42 M. L. J. 551 distd.

A. Krishnasami Aiyar for Appellant.

K. V. Krishnasami Aiyar and *T. M. Ramaswamy Aiyar* for Respondents.

T. S. V.

Beasley, J.
26th August, 1924.
C. M. P. No. 2644 *of* 1923.

Appeal—Respondent dead at the time of presentation—Procedure—Amendment of cause title—If enough.

His Lordship directed the papers to be placed before the Chief Justice in order that he might refer to a Full Bench the question whether an appellant who files an appeal against a respondent who is dead at that time can rectify his mistake by amending the cause title and impleading in his place his legal representatives, after setting aside the abatement, if any.

B. Satyanarayana for Petitioner.

P. Bapiraju for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
26th August, 1924.
S. A. No. 233 *of* 1921.

Trespass—Damages—Measure of—Factors to be considered.

The defendant used to hold a cattle fair on plaintiff's land with their permission and on payment of rent; subsequently he began to do it without asking for permission. In a suit for damages for trespass, *held* in assessing damages the Court should first fix a sum which, if negotiations had taken place between the parties, they would have settled to be a fair rent; to this amount should be added some compensation for the wilful nature of the trespass committed, but if the plaintiffs stood by and allowed the trespass to be committed without protest a deduction should be made on that score. 1 C. B. 841 6 Ch. A. 742 refd. to.

The Advocate-General for Appellants.

K. Raja Aiyar for Respondent.

T. S. V.

Ramesam and Reilly, JJ.
26th August, 1924.
S. R. No. 3877 *of* 1924.

Civil Procedure Code, O. 41, Rr. 22 and 12—Cross objections—Notice in Form VI-A—Memo. filed more than one month after service—If in time.

The respondent in an appeal in the High Court was served the usual form of notice (Form VI-A, Appellate Side Rules) directing him to enter an appearance and give notice thereof to the appellant within 25 days after service. He filed a memorandum of cross objections more than one month after the service of notice on him. *Held,* O. 41, R. 22 provides a period of one month from the date of service *of notice of the day fixed for hearing the appeal,* and as the notice under Form VI-A does not mention anything of the day fixed for hearing the appeal, the memorandum of cross objections must be deemed to be filed in time.

Desirability of amending the language of O. 41, R. 22 and of the form of notices under the Appellate Side Rules pointed out.

P. Satyanarayana Rao for Petitioner.

K. Kameswara Rao for Respondent.

T. S. V.

Devadoss and Jackson, JJ.
27th August, 1924. } *S. A. No.* 29 *of* 1922.

Mortgage—Joint mortgagees—Undertaking to pay to one—If a valid discharge.

Where a mortgage is executed in favour of two mortgagees, an undertaking by the mortgagor to pay the amount due to one of them at a future time, without the consent of the other, is not a valid discharge of the mortgage. 20 Mad. 361 36 Mad. 544 (F. B.) distd.

N. Rama Rao for Appellant.

K. B. Venkatachala Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

T. S. V.

Spencer, Offg. C. J. and Srinivasa Aiyangar, J. 26th August, 1924. } *O. S. A. No.* 50 *of* 1924.

Letters Patent, Cl. 15—*Application granting leave to sue* in forma pauperis—*Appeal against—Whether lies—Whether order, a "judgment".*

An order granting leave to sue as a pauper is a judgment within the meaning of S. 15 of the Letters Patent and as such appealable. 26 M. 437 not followed; 35 M. 1 followed.

K. Krishnaswami Aiyangar for Appellant.

K. Rajah Aiyar for Respondent.

C. A. S.

Beasley, J. 26th August, 1924. } *C. M. P. No.* 2880 *of* 1923.

Practice—Appeal preferred against a dead man—Substitution of the names of legal representatives on the appeal memorandum, whether legal—Conflict of authority—Reference to Full Bench.

On account of the conflict between 45 M. L. J. 231 and C.M.P. No. 2807 of 1923 (unreported) on the question whether, where an appeal is filed against a dead man, the mistake may be rectified by substituting the names of the legal representatives of the deceased on the appeal memo, or whether the appellant should file another appeal, his Lordship Mr. Justice Beasley ordered the above matter to be placed before the Chief Justice for reference to a Full Bench.

K. N. Rajagopal Sastri for *B. Satyanarayana* for Petitioner.

P. Bapiraju for Respondent.

C. A. S.

Devadoss and Jackson, JJ. 27th August, 1924. } *S. A. No.* 182 *of* 1922.

Hindu Law—Marriage—Form of—Approved or unapproved—Absence of money consideration—Exchange.

Prior to a Hindu marriage, the bride's parents demanded a certain sum of money as *sulka* but the arrangement finally

arrived at was to give a minor sister of the bridegroom in marriage to the brother of the bride. *Held*, per Devadoss, J. (Jackson, J. dissenting and holding *contra*) as there was no cash or money consideration for the marriage, the marriage was according to the approved form. Texts and case-law referred to.

K. S. Jayarama Aiyar for Appellant.

M. S. Venkatrama Aiyar for Respondent.

T. S. V.

Wallace, J.
27th August, 1924. } *C. R. P. No.* 899 *of* 1922.

Civil Procedure Code, S. 115 *and O.* 9, *R.* 9—*Dismissal for default—Setting aside "as a matter of grace"—Interference—Decree passed after trial—Effect.*

Where after dismissing a suit for default, the Court set aside the order "as a matter of grace," the order is one made without jurisdiction and is revisable. The principle of 43 Mad. 94 (F. B.) applies to cases under O. 9, R. 9 also.

The mere fact that during the pendency of the revision petition, the suit after restoration was proceeded with and resulted in a decree for the plaintiff does not bar the High Court from acting under its powers of revision.

P. V. Krishnaswami Aiyar for Petitioner.

A. Swaminatha Aiyar for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
27th August, 1924. } *C. M. A. No.* 22 of 1923.

Provincial Insolvency Act (*V of* 1920), *S.* 51—"*Before the date of the admission of the petition*"—*Construction of—Grammatical construction—Scope of—Sale and deposit of* 25 *per cent. prior to insolvency petition—Balance deposited after admission of petition—Proceeds in whom rests.*

An execution sale of a debtor's properties took place on 27th June, 1922, and the purchaser deposited as usual 25 per cent. of the purchase money. A creditor put in an insolvency

petition on 1st July, 1923, which was admitted on 4th July, 1923, and an interim receiver appointed for the sale proceeds. The balance 75 per cent. of the purchase money was paid in subsequently. *Held*, the decree-holder was not entitled to the sale proceeds as against the Receiver in respect of the 75 per cent. because it was deposited after the admission of the insolvency petition and in respect of the 25 per cent. because it was not " assets " until the entire purchase money was paid. Case-law referred to.

The words "before the date of admission of the petition " in S. 51 of Act V of 1920 qualify " assets " and not " sale, " and a grammatical construction is not sound. The provisions of S. 51 are exactly similar to S. 295 of the C.P. Code of 1882 and the change in language in S. 73 of the C. P. Code of 1908 does not affect its scope.

T. M. Krishnaswami Aiyar (with him *N. Sivaramakrishna Aiyar*) for Appellant.

S. Ranganatha Aiyar for Respondent.

T. S. V.

Devadoss and Jackson, JJ. *27th August,* 1924. — *S. A. No.* 200 *of* 1922.

Limitation Act, Art. 181—*Application for final mortgage decree—Time when commences to run—Suspension of limitation—Suit for declaring invalidity of mortgage—Pendency of—Effect.*

A preliminary decree was passed in a mortgage suit on 6th November, 1916, and time was given till 6th March, 1917, for redemption. Meanwhile a relation of the mortgagor sued for a declaration that the property was not liable to be sold for the mortgage debt and obtained a decree on 26th April, 1917, which was confirmed in appeal but was finally set aside in second appeal on 28th April, 1920. Thereupon the mortgagee decree-holder applied for final decree on 9th October, 1920. *Held*, under Art. 181 which applied, the cause of action for applying for final decree arose on 6th March, 1917, and the pendency of the declaration suit could not suspend the running of time unless there had been an express injunction or order granting stay of proceedings.

Effect of S. 9, Limitation Act, considered.

There cannot be a suspension of the running of limitation on grounds of equity, apart from the provisions of the Limita-

tion Act, 7 L. W. 438 ; 42 M. L. J. 51 ; 40 All. 235 ; 43 Mad. 185 (F. B.) ; 35 Cal. 209 ; 43 Cal. 660 referred to.

T. S. Ramaswami Aiyar and *V. Sundaram Aiyar* for Appellant.

T. M. Krishnaswami Aiyar for the *Advocate-General* for Respondent.

T. S. V.

Jackson, J.
28th August, 1924. } *C. R. P. No.* 228 *of* 1923.

Limitation Act, Ss. 4 *and* 12—*Time for obtaining copies—Interval between judgment and application for copy—If can be deducted—Vacation time.*

In computing time for obtaining copies of judgment, the period antecedent to applying for the same cannot be deducted. 43 Mad. 640 ; 12 L. W. 460 followed.

Where there was an interval of a day between the long vacation and the date on which judgment was given, S. 4, Lim. Act, does not apply and the vacation time cannot be deducted.

T. R. Arunachala Aiyar for *B. Somayya* for Petitioner.

C. S. Rama Rao Saheb for *M. Patanjali Sastri* for Respondent.

T. S. V.

Devadoss, J.
29th August, 1924. } *S. A. No.* 122 *of* 1922.

Mortgage—Moveables—Sale of hypotheca by mortgagor—Purchase of fresh articles of same kind—Lien if attaches.

A person mortgaged his two bulls, retaining possession himself. He subsequently sold them and with the sale proceeds purchased other bulls. A creditor of the mortgagor attached the same and on a question arising between the attaching creditor and the mortgagee, *held*, the mortgage lien did not attach itself to the new bulls and the attaching creditor could attach the bulls as belonging to his judgment-debtor. 5 Mad. 330 folld. ; (1914) A. C. 398 referred to.

K. Rajah Aiyar for Appellant

M. S. Venkatrama Aiyar for Respondent.

T. S. V.

Devadoss, J.
1*st September,* 1924. } *S. A. No.* 1165 *of* 1921.

Civil Procedure Code, O. 21, *R.* 35—*Ejectment decree—Obtaining of formal delivery—Suit for possession—Maintainability.*

After obtaining a decree in ejectment, the plaintiff applied for execution and got a delivery warrant. The warrant was returned as executed and the plaintiff also gave a signed receipt. He then filed a fresh suit for possession, and it was found as a fact that during the prior execution proceedings, the judgment-debtor had refused to give up possession and there was no actual delivery. *Held,* the second suit was not maintainable. Where a decree-holder entitled to actual possession gets only formal possession or a paper delivery, he gets no possession at all and it does not give him a fresh cause of action. 44 I. C. 839 ; 36 Bom. 373 and 43 All. 520 relied on. 17 M. L. J. 598 doubted.

B. Jagannadha Doss for Appellant.

K. N. Rajagopala Sastry for *B. Satyanarayana* for Respondent.

T. S. V.

Devadoss, J.
3*rd September,* 1924. } *S. A. No.* 1216 *of* 1921.

Mortgage—Usufructuary mortgage—Period of possession fixed—Failure to comply with stipulations—Suit for redemption and accounts prior to expiry of period fixed—Maintainability.

Under a usufructuary mortgage deed styled *sharat-u-bandi cowle* the mortgagee was to remain in possession for 55 years, but there was no provision as to interest or taking accounts. Out of an agreed income of Rs. 240 per year, Rs. 100 was to be paid as taxes, Rs. 60 as an allowance to the mortgagor and Rs. 80 to go in discharge of the mortgage debt. For a number of years the mortgagee failed to pay the annual allowance of Rs. 60 and an assignee from the mortgagor filed before the expiry of 55 years a suit for a declaration the mortgage had been discharged and for accounts. *Held,* the suit was maintainable and was not premature, as the mortgagee failed to carry out the covenants in the deed. In taking accounts the

allowances not paid would go in towards discharge of the deed. 10 Eq. 497 ; 11 Eq. 541 ; 34 All. 659 44 All. 185 (P. C.) folld.

P. Somasundaram and *Satyanarayana* for Appellant.

G. Lakshmanna for Respondent.

T. S. V.

Madhavan Nair, J.
9th September, 1924. } *S. A. No.* 391 *of* 1922.

Agricultural lease—Notice to quit—Period of—Law applicable.

In the case of agricultural leases, if the landlord wants to get back the lands from his tenant, neither the Transfer of Property Act nor the English Law strictly applies as regards the period of the notice to quit. Any reasonable notice, having regard to the custom of the country is sufficient. 33 M. L. J. 512 ; 9 Cal. 48 ; 42 I. C. 375 folld. ; 42 Mad. 654 explained ; 11 East 311 not followed.

K. Srinivasa Rao for Appellant.

V. Narayanan amicus curiae for Respondent.

T. S. V.

Ramesam, J.
10th September, 1924. } *C. R. P. No.* 30 *of* 1924.

Civil Procedure Code, S. 115—*Amendment of plaint—Refusal to order—Interference.*

The High Court will interfere in revision under S. 115, C. P. Code, against orders refusing to amend the plaint under O. 6, R. 17, where the amendment is to make the plaint clearer and more comprehensive. 46 M. L. J. Notes of Recent Cases, p. 46 followed.

P. V. Krishnasami Aiyar for Petitioner.

A. S. Viswanatha Aiyar for Respondent.

T. S. V.

Venkatasubba Rao and Jackson, JJ.
11th September, 1924.
Ref. Case No. 10 *of* 1924.

Bill of sale—Thavanai—Meaning of—Credit period—Rule of construction.

In a suit for balance due for the price of articles sold, the entry in the ledger was " Debit to X interest at ½ per cent. per mensem after 60 days *thavanai.*" *Held,* the term *thavanai* meant credit period and in computing limitation for the suit the transaction is to be considered as credit sale.

Per Venkatasubba Rao, J. :—In construing the meaning of a term, reference to dictionaries of good reputation and also the meaning ordinarily given to it amongst persons who use it are relevant. If it is to be given a secondary meaning, Courts should be satisfied from the document and the circumstances that the popular or primary sense are not intended. (1914) 1 Ch. 176 ; 16 Ch. D. 718 and Evidence Act, Ss. 92 (5) and 98 referred to.

Per Jackson, J. :—The term *thavanai* has no more significance than the Latin *per.* It does not in itself convey the idea of credit, but any particular sense can be proved by evidence *aliunde.*

S. Subramania Aiyar for *S. Rangasamy Aiyangar* for Petitioner.

K. Bashyam Aiyangar and *T. K. Srinivasathathachari* for Respondent.

T. S. V.

Jackson, J.
11th September, 1924.
C. R. P. No. 260 *of* 1923.

Interest Act—Demand—What amounts to—Headline in a trademan's bill—Acceptance of bills—Effect.

A headline in a trademan's bill intimating that interest would be charged on the amount remaining unpaid after a fixed period does not constitute a demand under the Interest Act ; nor can an agreement to pay interest be implied from the mere fact that such bills have been sent for some time and no objection raised thereto. 20 I. C. 194 and 65 L. T. 453 followed.

K. Rajah Aiyar for Petitioner.

V. Ganapathi for Respondent.

T. S. V.

Spencer, O. C. J. and Srinivasa Aiyangar, J. 12th September, 1924. } O. S. A. No. 61 *of* 1923.

Negligence—Railway lines—Child of seven sustaining injuries by being run over by an engine—Damages—Suit for—Liability.

A little girl aged seven sustained severe personal injuries by being run over by a locomotive engine when she was crossing a Railway line. The evidence in the suit for damages was to the effect that the villagers habitually crossed the line at the place where the incident happened as a short cut. The Trial Court held a child of seven could not be guilty of contributory negligence and decieed the suit. *Held,* reversing the decision in 45 M. L. J. 545 the Railway Company was not liable. 12 Q. B. D. 91 ; (1916) 2 Ir. R. 572 ; 15 Q. B. D. 101 ; (1909) A. C. 229 ; (1912) 1 K. B. 525 ; (1913) 1 K. B. 398 ; (1911) A. C. 10 ; (1922) A. C. 44 refd. to.

Vere Mockett instructed by *Messrs. King and Partridge* for Appellant.

T. V. Ramanatha Aiyar and *M. P. Sundararaja Aiyar* for Respondent.

T. S. V.

Madhavan Nair, J. *12th September,* 1924. } S. R. No. 9636 *of* 1923.

Court Fees Act, S. 7 (*v*) *and Sch. II, Art.* 17 (*b*)*—Durga—Suit for declaration of sajjadanashinship and for possession—Court fee.*

A suit for a declaration that the plaintiff is the *sajjadanashin* of a certain *Durga* and for possession of the suit properties from the defendants falls under S. 7 (*v*) of the Court Fees Act and not under Art. 17 (*b*) of Schedule II and *ad valorem* Court fees are payable. 36 Mad. 364 ; 33 Mad. 452 ; 8 Mad. 516 ; 19 All. 60 ; 21 All. 212 ; 12 C. L. J. 211 referred to.

The *Advocate-General* and *K. S. Desikan* for Appellant.

S. Varadachari for the Government.

T. S. V.

Madhavan Nair, J.
12th September, 1924.
} *S. A. No.* 433 *of* 1922.

Malabar Law—Karamkozhu tenure—If forfeited by alienation—Difference between karamkari and karamkozhu—Otti of lands—Effect.

The *karamkozhu* tenure in North Malabar is the same as *karamkari* in South Malabar and is not forfeited by alienation. 38 M. L. J. 275 and 45 Mad. 397 (F. B.) followed.

Semble :—Even if alienation works a forfeiture, an otti cannot be deemed to be such an alienation

K. P. Ramakrishna Iyer for Appellant.

V. P. Karunakaran Nambiar for Respondent.

T. S. V.

Venkatasubba Rao and Jackson, JJ.
15th September, 1924.
} *C. M. A. No.* 127 *of* 1924.

Guardians and Wards Act, Ss. 19 *and* 25— *Application by Hindu father to be appointed or declared guardian of minor child—Maintainability—Child in the custody of maternal relations from date of birth—Action if can be taken under S.* 25.

A Hindu father applied under the Guardians and Wards Act to be appointed guardian of his minor child which from the time of birth was in the custody of its maternal relations. *Held,* though it was never actually in the custody of the father, it may be deemed to have been removed from his custody when the persons in actual possession repudiated his rights to his knowledge, and where the Court finds it would be to the benefit of the minor to be with the father, it can direct the child to be handed over under S. 25, Guardians and Wards Act. 37 All. 578 and 39 Mad. 608 followed.

Per Venkatasubba Rao, J. :—S. 19 has been badly drafted, but it does not deprive a Hindu father of his right to apply to be appointed guardian under the Act unless he is unfit to be

such. 18 L. W. 173 folld. ; observations in 41 I.A. 314 held to be *obiter dicta.*

T. V. Venkatrama Aiyar and *T. V. Ramanatha Aiyar* for Appellant.

V. Govindarajachari for Respondent.

T. S. V

Ramesam and Reilly, JJ.
16th September, 1924.
C. M. P. No. 2153 *of* 1922.

Religious Endowment—Mutt situated in Cochin State—Devaswom in British Malabar—Udama of latter vested in head of mutt—Removal of Head by the Cochin Government under a State Regulation—If udama of devaswom ipso facto *vested in the new Head—Creation of vacancy—Usage.*

The succession to the trusteeship of a Devaswom in South Malabar was dependant on the headship of a *Matam* in the Cochin State, and whoever was the head of the *matam* would also be the trustee of the temple. Under a Regulation in force in the Cochin State, the Government called upon the head of the mutt to submit accounts and as it was not duly complied with, action was taken thereunder by appointing a junior member trustee. The latter contended that by this executive act he *ipso facto* became the trustee of the *Devaswom* also. *Held,* in the absence of proof of usage to the effect that such removal created a vacancy in the trusteeship of the *devaswom* the claim was not sustainable. 17 Cal. 3 (P. C.) referred to.

S. Srinivasa Aiyangar and *T. S. Anantarama Aiyar* for Petitioner.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for Respondent.

T. S. V.

The Offg. C. J. and Reilly, J.
10th September, 1924. } *R. T. No.* 51 *of* 1924.

Cr. P. C., S. 162—*Difference between old and new section—Evidence Act, S.* 27, *if superseded by S.* 162, *Cr. P. C.*

Per Spencer, O. C. J. (Reilly, J. expressing no opinion).—S. 162, Cr. P. C., even as amended in 1923, excludes only written statement and not oral statement and does not affect the operation of S. 27 of the Evidence Act.

K. P. Ramakrishna Iyer for Appellant.

The Public Prosecutor, *J. C. Adam,* for the Crown.

T. S. V.

Madhavan Nair, J.
16th September, 1924. } *S. A. No.* 242 *of* 1922.

Malabar Law—Tarwad—Division into branches by partition—Sub-division of branches—Extinction of sub-branch—Property on whom devolves.

Obiter: When a Malabar tarwad splits itself into a number of branches and one of such branches further splits itself into a number of sub-branches, and one of these sub-branches becomes extinct, its property goes to the branch from which it separated last. S. A. No. 1815 of 1911; A. S. No. 261 of 1919; 32 Mad. 251; 38 Mad. 48 referred to.

K. Krishna Menon for Appellants.

D. A. Krishna Variar for Respondents.

T. S. V.

Madhavan Nair, J.
16th September, 1924. } *S. A. No.* 251 *of* 1922.

Lease—Grant by a Hindu member—Fresh lease by widow—Avoidance of—Effect—Revivor of prior grant—Registration.

A Hindu granted a lease and subsequent to his death his widow granted a new lease on the same terms but without reference to the prior lease. At the instance of the reversioners the lease by the widow was declared to be invalid.

Held, the principle of implied surrender arising by the taking of a fresh lease did not apply and Courts could import

an implied condition that on the failure or avoidance of the later lease, the original lease would revive. English cases referred to.

Where the terms of a lease allowed the lessee to cultivate as long as he liked on the payment of annual rent, subject to forfeiture for non-payment of rent, the lease is not one for the life of the lessee and does not require registration. 27 Mad. 143 foll.

B. Somayya for Appellant.

T. M. Krishnaswamy Aiyar for Respondents.

T. S. V.

Jackson, J.
16*th September*, 1924. } *C. R. P. No.* 524 *of* 1924.

Madras District Municipalities Act—Rules under—Rr. 7 (1) *and* 23 (*a*)—*One of two candidates withdrawing candidature by letter—No poll taken—Election petition impeaching letter as forgery—If maintainable.*

Where there are two candidates for a Municipal election and as a result of a letter from one of the candidates purporting to withdraw his candidature, no poll takes place, he cannot maintain an election petition based on the allegation the letter of withdrawal was a forgery. Rules 7 (1) and 23 (*a*) of the Election Rules and 45 M. L. J. 23 referred to.

K. Bashyam Aiyangar for Petitioner.

K. S. Jayarama Aiyar for Respondent.

T. S. V.

Ramesam and Jackson, JJ.
17*th September*, 1924. } *A. S. No.* 97 *of* 1921.

Shipping—Charterparty—Deviation — Vessel overtaken by storm—Jettison of goods—Vessel stranded at intermediate port—Damages.

Where a vessel was chartered to carry goods from Calicut to Shar Macala in Arabia, and an advance freight was paid, but the vessel went to Marmagoa to pick up a *tindal*, and was overtaken by a storm, as a consequence of which some of the goods were jettisoned and the rest unloaded at Karwar,

Held, there was a deviation, and the shipowner cannot claim exemption for loss of goods by Act of God, and he was liable for damages for loss of goods, advance freight for loading and unloading charges, and all expenses incurred.

Maclachlan on Merchant Shipping, p. 473, referred to.

K. P. Ramakrishna Iyer for Appellant.

Mohamed Ibrahim Saheb and *G. Ramakrishna Iyer* for Respondent.

T. S. V.

Venkatasubba Rao and Jackson, JJ.
17*th September,* 1924. } *L. P. A. No.* 6 *of* 1924.

Appeal—Partnership—Suit for dissolution and accounts—Decree for fixed amount—Appeal by defendant partners—Death of one—Legal representatives not impleaded—Effect.

In a suit for dissolution of partnership and accounts, the defendants denied partnership, but the Court found against the plea and as no accounts were forthcoming passed a decree for a fixed amount against the defendants. The latter appealed and during the pendency thereof one of them died but his legal representatives were not brought on record. *Held,* the principle laid down in 31 Cal. 489 would not apply and the appeal could be proceeded with even in the absence of the heirs of the deceased. O. 41, Rr. 4, 20 and 33 referred to.

A. Krishnaswami Aiyar and *B. Somayya* for Appellant.

L. A. Govindaraghava Aiyar and *L. S. Viraraghava Iyer* for Respondent.

T. S. V.

Jackson, J.
18*th September,* 1924. } *C. M. P. No.* 2221 *of* 1923.

Civil Procedure Code, S. 146, *O.* 1, *R.* 10 *and O.* 22, *R.* 10—*Suit for partition—Share awarded in trial Court—Reversal in appeal—Transfer of rights* pendente lite—*Second appeal* in forma pauperis—*Death of appellant—Transferee if can continue appeal.*

In a partition suit a person got a decree for his share of the joint properties, but the decree was reversed in appeal.

Pending the appeal he transferred his rights to another. He then filed a second appeal *in forma pauperis* and died during the pendency of the same. The transferee then applied to come on record and continue the appeal. *Held,* (1) he was not entitled to do so *in forma pauperis,* and (2) neither S. 146 nor O. 1, R. 10 nor O. 22, R. 10 applied to the case and the transferee could not continue the appeal. 44 Mad. 919 at 928, 932; (1924) M. W. N. 62 referred to.

N. Chandrasekhara Aiyar for Petitioner.

M. S. Venkatrama Aiyar for Respondent.

T. S. V.

Devadoss, J.
18th September, 1924. } *S. A. No.* 582 *of* 1922.

Evidence—Admissibility—Hearsay evidence—Will alleged to be lost—Person with whom original deposited alive—Not examined—Witness speaking to hearing it from such person.

In a suit for possession as reversioner, the defence pleaded an adoption in pursuance of an authority contained in a will. The will was impugned as forgery and the defence put in a registration copy alleging the original had been burnt. The person with whom the will was deposited though alive and summoned to give evidence did not appear. Another witness deposed that the abovementioned person told him the will was burnt in a fire. *Held,* it was hearsay and not admissible to prove the loss. Taylor on *Evidence,* para. 430 referred to, not followed.

C. Rama Rao for Appellant.

P. Vallabachary for Respondent.

T. S. V.

Devadoss, J.
17*th September*, 1924. } *S. A. No.* 292 *of* 1921.

Appeal—Devaswom—All uralars *party appellants—Death of one—Legal representative not brought on record—Effect—C. P. Code, O. 22, Rr.* 3 *and* 10.

Where in an appeal relating to a *Devaswom* in Malabar, all the *uralars* thereof are party appellants and during the pendency of the appeal one of them dies and his legal representatives are not brought on record, the appeal cannot be proceeded with, as all trustees must be parties. 15 L. W. 285 followed. In such a case the rule applicable is O. 22, R. 3 and not under O. 22, R. 10. 25 Bom. 363 distinguished.

C. V. Anantakrishna Aiyar for Appellants.

D. A. Krishna Variar for Respondents.

T. S. V.

Ramesam and Jackson, JJ.
19*th September*, 1924. } *A. S. No.* 363 *of* 1920.

Landholder and ryot—Land Acquisition Act—Compensation for land on the basis that land is fit for building purposes—Excess compensation over value as agricultural land—Right of ryot to share in such excess compensation.

Where agricultural land in a Zemindari acquired under the provisions of the Land Acquisition Act is valued on the basis that it is fit for building purposes and its value as building land is in excess of its value as agricultural land, the landholder is entitled to share the excess value along with the ryot. 42 Mad. 644 considered.

V. Govindarajachari for *A. Krishnaswami Aiyar* for Appellant.

The Government Pleader and *P. Satyanarayana* for *P. Somasundaram* for Respondents.

C. A. S.

Madhavan Nair, J.
19*th September*, 1924. } *S. A. No.* 404 *of* 1922.

Limitation Act, Arts. 137, 138*—Auction sale—Purchaser—Suit for possession—Property alienated pending attachment—Effect—Limitation—Civil Procedure Code, S,* 64,

N R C

During the pendency of an attachment the judgment-debtor mortgaged the properties giving possession to the mortgagee. The purchaser sued for possession and redemption more than 12 years after the purchase. *Held*, under S. 64, C. P. Code, the alienation being one made pending attachment was void. 44 M. L. J. 80 and 36 I. C. 511 explained. 42 Mad. 322 and 29 Cal. 154 (P.C.) followed ; but whether under Art. 137 or Art. 138, Limitation Act, the suit was barred.

K. Bashyam Aiyangar and *S. Krishnasamy Aiyangar* for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

T. S. V.

Madhavan Nair and Jackson, JJ.
22nd September, 1924.
C. M. S. A. No. 39 *of* 1923.

Civil Procedure Code, S. 47 *and O.* 21, *R.* 2—*Agreement prior to decree not to execute same in certain events—Plea in execution—If allowed.*

An agreement prior to decree not to execute the decree that may be finally passed in certain events can be pleaded in defence when execution is taken out and the Court is bound to consider the question of the agreement on the merits. 40 Mad. 233 (F.B.) ; 8 L.W. 205 ; 37 M.L.J. 356 ; 19 L.W. 27 followed. 43 Mad. 725; 14 L.W. 317 distinguished.

K. V. Sesha Aiyangar for Appellant.

C. Veeraraghava Aiyar for Respondent.

T. S. V.

Devadoss, J.
23rd September, 1924.
S. A. No. 76 *of* 1922.

Negotiable Instruments Act, S. 87—*Promissory note—Material alteration—What amounts to—Mark of one executant put without his permission—Effect—Decree if can be granted against other executant.*

In a suit on a promissory note against two defendants it was found that one of them alone signed it, but that the mark of the other was affixed without his permission afterwards. *Held*,

in the absence of any intention to cheat or deprive the second executant of any property, there was no bar to the passing of a decree against the first defendant alone. S. 87 of the Negotiable Instruments Act did not apply and it is only where a person enters into a contract on the stipulation that some one else also is to be a party thereto that it is unenforceable against him when the other person does not actually join. The alteration was held not to amount to a "material alteration" within the meaning of S. 87. 33 Cal. 812; 26 M. L. J. 257; C. R. P. 601 of 1912 distd.; (1892) 2 Q. B. 724; 98 E. R. 1120 referred to.

The Advocate-General for Appellant.

T. V. Muthukrishna Aiyar and *A. Swaminatha Aiyar* for Respondents.

T. S. V.

Wallace, J.
24th September, 1924. } *C. R. P. No.* 590 *of* 1920.

Civil Procedure Code, O. 22 R. 10—Applicability—Suit for redemption by stani*—Death of stani—*Melcharthdar *from successor—Application to come on record as plaintiff—If maintainable.*

Pending a suit for redemption, the plaintiff who was a *stani* died. His successor did not apply to come on record as plaintiff, but granted a *melcharth* to the petitioner with power to carry on the litigation. The latter applied to be added as party plaintiff. *Held,* O. 22 R. 10, C. P. Code, applies only to an assignee from the plaintiff and therefore the petitioner could not be added as party to the suit. 39 Mad. 884 followed.

K. P. Krishna Menon for *K. P. M. Menon* for Petitioner.

K. B. Venkatachala Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

T. S. V.

Madhavan Nair, J.
25th September, 1924. } *S. A. No.* 303 *of* 1922.

Limitation Act, Arts. 97, 83*—Agreement to enter satisfaction—Failure—Application to enforce—Dismissal of—Realisation in execution afresh—Suit for refund—Limitation.*

A mortgage decree having been obtained by the eldest of three brothers forming a joint family, the younger brothers represented to the mortgagor that that debt had been allotted to them on partition. The decree amount was paid to them, and a receipt obtained. The judgment-debtor applied to have satisfaction entered, but on objection by the real decree-holder (eldest brother) the application was dismissed. Thereafter the latter realised the amount in execution and the judgment-debtor sued the brothers for refund of amount originally paid. *Held*, the suit fell under Art. 97, Limitation Act, and the period of three years would run from the date of dismissal of the application to enter up satisfaction and not from the date when the amount was realised again. 43 M. L. J. 721 ; 46 Cal. 670 followed.

S. Doraisamy Aiyar for Appellant.

S. Ranganatha Aiyar and *A. V. K. Krishna Menon* for Respondent.

T. S. V.

Devadoss, J.
25th September, 1924. } *S. A. No.* 482 *of* 1922.

Decree—Setting aside of—Nature of fraud to be proved—Facts false to the knowledge of plaintiff—If sufficient.

The fact that a plaintiff in a suit obtained a decree on the basis of facts which he knew to be false is not sufficient to have the decree set aside on the ground of fraud. In order to set aside a decree on the ground of fraud, the aggrieved party must prove that fraud was practised on the Court. 10 Ch. D. 327 ; 21 Cal. 612 ; 56 I. C. 270 followed ; 38 Cal. 936 not followed ; 14 C. W. N. 695 ; 18 C.W.N. 447 ; 41 Mad. 843 (F.B.) referred to.

C. S. Venkatachari for Appellant.

B. Somayya for Respondent.

T. S. V.

Jackson, J.
18th September, 1924. } *C. R. P. No.* 232 *of* 1923.

Religious Endowments Act, S. 10—*Filling up by the District Judge of vacancy in the Devastanam Committee—No members of the Committee in existence owing to death, resignations and removal—Validity of appointment.*

Some members of the Madura Devastanam Committee, which consisted of five persons, were removed from office by the District Court, and of the remaining members, one died and the other resigned the office. The two vacancies caused by death and resignation remained unfilled for a period of three months, as there was no member of the Committee functioning to take steps to fill up the vacancy. The District Judge himself filled up the vacancies without ordering an election. *Held,* on revision against the order of the District Judge, that the District Judge was entitled under S. 10 of the Religious Endowments Act to make the appointments, though the non-filling of the vacancy was due to no default on the part of the Committee members.

F. S. Vaz for Petitioner.

T. M. Krishnaswami Aiyar and *B. C. Seshachala Iyer* for Respondents.

C. A. S.

Devadoss, J.
30th September, 1924. } *S. A. No.* 460 *of* 1922.

Deed—Construction—Mortgagee's covenant with mortgagor—Payment of rent in kind—Money value fixed—Redemption—Market value at the date of redemption to be taken.

A mortgagee covenanted to hold the mortgage properties under the following terms:—"Out of the annual rent of 33 *paras* of paddy after deducting the interest due under the mortgage 30 *paras* of paddy equivalent in value to Rs. 22-8-0 is to be paid. If arrears of *purappad* are allowed to accrue, the value of the same at 12 annas per *para* may be set off against my mortgage amount." *Held,* the contract was primarily one for payment in kind and in default the mortgagee at the

time of redemption was bound to pay its value at the market rate and not at 12 annas as fixed in the deed. C. R. P. 357 of 1921 followed.

P. Govinda Menon for Appellant.

A. R. Sundara Aiyar for Respondent.

T. S. V.

Ramesam and Jackson, JJ.
1st October, 1924. } *A. S. No.* 136 *of* 1922.

Action on domestic judgment—Action whether and when maintainable—Civil Procedure Code, S. 47*—Limitation.*

Where in a suit for dissolution of accounts of a partnership, in regard to sums alleged to be due from one of the partners, the Court instead of directing an account of the same to be taken in the partnership action and passing an executable decree in favour of the other partners merely declared the liability of the partner and directed the Receiver in the action to recover it by suit from the partner who was liable to make good the amount, *held,* (1) in the circumstances the judgment itself must be taken to create fresh rights and obligations between the parties; (2) the English Common Law rule that an action can be filed on foot of a domestic judgment is applicable to India in cases of judgments and decrees not affected by S. 47 of the Civil Procedure Code ; (3) the limitation for such action commences from the date of judgment and Art. 122 applies to the case.

A. Krishnaswami Aiyar and *M. Patanjali Sastri* for Appellant.

K. Bhashyam Aiyangar and *P. J. Kuppanna Rao* for Respondent.

C. A. S.

Wallace, J.
1st October, 1924. } *C. R. P. No.* 1086 *of* 1923.

Court Fees Act, S. 7 *(iv) (b)—Joint family—Suit for partition—Share not denied—Constructive possession—Nature of—Test.*

The plaintiff filed a suit for partition against his father and brothers alleging the properties were in the management of the defendants and that he was entitled to a share. There was

no specific allegation that he was in joint possession and he gave his own valuation for the relief under S. 7 (iv) (*b*), Court Fees Act. Subsequent to the filing of the plaint, the defendants had admitted plaintiff's right to a share, but it was evident that they were not giving his share of the profits to the plaintiff. *Held*, as plaintiff's right to a share was not denied he was in constructive possession through the manager of all the family properties and S. 7 (iv) (*b*) would govern. For the purposes of the section constructive possession is quite as good juridical possession as actual physical possession. The test to find out whether a particular person is in possession of joint family property is to see if limitation can be said to run against him in favour of those in possession so as to bar his title. 21 M. L. J. 21 (F.B.) followed.

T. M. Krishnaswami Aiyar and *S. Anantarama Aiyar* for Petitioner.

S. Rangachari for *K. R. Rangaswami Aiyangar* for Respondents.

T. S. V.

Jackson, J.
2nd October, 1924. } *Cr. R. C. No.* 184 *of* 1924.

Madras District Municipalities Act V of* 1920—*Conviction for disobedience of notice under S.* 219 (1)—*Whether Court can interfere with Chairman's discretion—Revision against acquittal.

The accused was convicted for disobedience of a notice to remove a dangerous tree under S. 219 (1) of the Madras District Municipalities Act. On appeal the appellate Court considered the question of the dangerous condition of the tree and came to the conclusion that it was not dangerous and acquitted the accused. *Held*, the appellate Court could not go into the merits of the notice. The Court should only be satisfied that the notice was neither unlawful nor ***ultra vires***. In a case where the appellate Court improperly entered into that question and acquitted the accused the High Court would interfere in revision.

P. V. Rangaram for Petitioner.

B. Jagannadha Das for Accused.

The Public Prosecutor on behalf of the Crown.

C. A. S.

Devadoss, J. }
3rd October, 1924. } *S. A. No.* 837 *of* 1922.

Deed—Construction—Maintenance—Paddy fixed—Price in lieu of—If market value can be claimed.

A maintenance deed provided for a certain measure of paddy being paid every year and in default the price thereof at a certain fixed rate per measure. On default the grantee sued for the price of the paddy at the market rate then prevailing. *Held,* he was only entitled to the rate fixed in the deed. 47 Cal. 133 followed ; C. R. P. 357 of 1921 and S. A. 460 of 1922 (47 M. L. J. Notes of Recent Cases, page 57) distinguished.

K. Ramanath Shenai for Appellant.

K. B. Venkatachela Aiyar for *C. V. Anantakrishna Aiyar* for Respondent.

T. S. V.

Devadoss, J. }
8th October, 1924. } *S. A. No.* 688 *of* 1921.

Land Acquisition Act, Ss. 3 *(f) and* 6 (3)—*Acquisition of house sites for Panchamas—If a public purpose—Declaration of Government—If conclusive—S.* 6 (3) *if* ultra vires.

The acquisition of house sites for *Panchamas* is a "public purpose" within the meaning of the Land Acquisition Act. 9 Ch. A. 423 ; 2 H.L. 443 ; 7 Q. B. D. 505 ; 13 Bom. L.R. 1097; (1919) A. C. 641 referred to.

When the Government makes a declaration under S. 6 (3) that the acquisition is for a public purpose, it does a certain act which it is authorised to do under the Act and it is not open to the Municipal Courts to question the same. 4 Cal. 172 (P.C.) ; 1 Bom. 367 (P.C.) followed ; powers of Indian legislature considered.

S. 6 (3) is not new but occurs in prior enactments. It does not take away any right of suit which a party has in respect of any act by which he feels aggrieved and is not *ultra vires* of the Indian legislature. 40 Cal. 391 ; 39 Bom. 279 ; 32 Cal. 605, referred to.

S. Muthiah Mudaliar for Appellant.

The Government Pleader for Respondent.

T. S. V.

Devadoss, J. }
8th October, 1924. } *S. A. No.* 831 *of* 1921.

Evidence Act, S. 92—Sale deed—Statement that there is no encumbrance—Knowledge of encumbrances—Oral evidence as to—Admissibility.

A statement in a sale deed that there are no encumbrances over the property is not one of the terms of the contract and where oral evidence is sought to be let in that the recital of no encumbrance was put in because the existence of the encumbrance was disclosed to him and he undertook to discharge it himself, S. 92, Evidence Act, is not a bar. 38 Mad. 514; 20 Bom. 529; 17 I. C. 43 referred to.

C. S. Venkatachari for Appellant.

S. R. Muthusami Aiyar for Respondents.

T. S. V.

Ramesam and Jackson, JJ. }
8th October, 1924. } *C. M. A. No.* 245 *of* 1924.

Mortgage—Preliminary decree in respect of two securities—Payment of certain sum—Absence of appropriation—Final decree—Agreement to postpone execution and pay higher rate of interest—Accessions to security—Rights to—Higher rate if enforceable by suit or in execution.

After the passing of a preliminary decree for sale in respect of two limited securities, a certain sum was paid generally towards the decree amount, neither party appropriating it towards either security in particular. After the passing of the final decree, an agreement was recorded under O. 21, R. 2 that for a specified time no execution was to take place, but that the debtor was to pay a higher rate of interest. *Held*, (1) the higher rate was enforceable in execution and not by way of a separate suit, 2 I. A. 219 followed; (2) the amount paid after the preliminary decree could not be proportionately apportioned as between the two securities; and (3) all accessions to the security could be sold in execution of the decree.

The Advocate-General and *T. M. Ramaswamy Aiyar* for Appellant.

S. Varadachari and *M. Balasubramania Mudaliar* for Respondent.

T. S. V.

N R C

Ramesam and Jackson, JJ. } *A. S. No.* 148 *of* 1922.
9th October, 1924.

Limitation Act, Art. 62—*Hundi collections—Permanent lease—Suit to set aside—Dismissal by trial Court but allowed in appeal—Suit for collections during pendency of prior suit—Cause of action.*

A suit by two worshippers of a temple to set aside a permanent lease of Hundi collections granted by the Temple Committee in favour of the *archakas* was dismissed by the District Munsif. In Second appeal a Receiver was appointed to make the collections and finally the High Court set aside the lease. The Trustees then brought a suit within three years of the High Court decree but more than 3 years after the decrees of the Courts below for recovery of the amounts collected by the *archakas* from the date of the prior suit up to the appointment of a Receiver by the High Court. *Held,* (1) the cause of action arose when collections were made and Art. 62, Limitation Act, would apply ; (2) the right to sue for the collections was not suspended till the date of the High Court decree as the decree in the prior suit was merely declaratory. L. R. 3 P. C. 465 ; 23 M. 306 ; 10 M. I. A. 203 ; 11 All. 47 distinguished.

Worshippers of a temple are not its representatives for the purposes of S. 11, C. P. Code.

The rule of principal and dependant decrees stated. 46 Mad. 895 (P.C.) ; 12 L. W. 334 referred to.

T. M. Krishnasami Aiyar for *The Advocate-General* and *P. J. Kuppanna Rao* for Appellant.

S. Varadachari and *N. C. Vijiaraghavachari* for Respondents.

T. S. V.

Ramesam and Jackson, JJ. } *C. M. A. No.* 76 *of* 1923.
9th October, 1924.

Mortgage—Prior and subsequent—Sale and purchase by prior mortgagee of portion of property in execution of small cause decree—Subsequent suit by prior mortgagee on his mortgage—Sale of rest of property—Later suit by puisne mortgagee—Rights of parties.

Three items of properties were mortgaged to A and B in succession. A purchased two of the items in execution of a small cause decree against the mortgagor. He then brought a suit on his mortgage for the sale of the third item impleading B in the suit and obtained a decree for sale for the balance due to him after giving full credit for the proceeds realised by the sale of the first two items. B thereafter sued on his mortgage for sale of all the items subject to the first mortgage. *Held*, the effect of A's decree was to regard the first two items as having been sold free of the second mortgage and as regards the third item, B's right was only to the surplus sale proceeds, if any, and the suit was not sustainable. 24 All. 429 (P. C.) followed. (1918) M. W. N. 902 explained and distinguished.

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar* for Appellant.

K. Balasubramanya Aiyar for Respondent.

T. S. V.

The Offg. Chief Justice and Srinivasa Iyengar, J. *10th October*, 1924. } C. *M. P. No.* 3169 *of* 1924.

Civil Procedure Code, S. 110—*Leave to appeal—Company—Winding up—Petition by secured creditor—Security for more than Rs.* 10,000—*Subject-matter of appeal.*

Where a secured creditor, whose security was for more than Rs. 10,000, applied for the winding up of a limited company on the ground it was unable to pay its debts, the subject-matter of the appeal for the purpose of S. 110, C. P. Code, must be deemed to be more than Rs. 10,000, and hence where the High Court reversed the decision of the Court below, leave to appeal to the Privy Council must be granted.

T. R. Ramachandra Aiyar, S. Srinivasa Aiyar and *V. C. Gopalaratnam* for Petitioners.

A. Krishnasami Aiyar (*K. Kameswara Rao* with him) for Respondents.

T. S. V.

The Offg. Chief Justice, Kumaraswami Sastri and Krishnan, JJ. *13th October*, 1924. } C. *M. P. No.* 2880 *of* 1923.

Civil Procedure Code, S. 153—*Appeal against dead respondent—Amendment of cause title—If to be allowed—Procedure.*

Where at the time an appeal is presented the respondent is dead, the Court has power under S. 153, C. P. Code, to allow the appellant to amend the cause title. In such a case the Court should not dismiss the appeal but allow an amendment and if at the time of amendment the appeal is out of time to consider if there is reasonable ground for excusing the delay. The decision of Ramesam and Wallace, JJ. in C.M.P. No. 2807 of 1923 followed ; 45 M. L. J. 231 overruled.

K. N. Rajagopala Sastri for *B. Satyanarayana* for Petitioner.

P. Bapiraju for Respondent.

T. S. V.

Ramesam and Odgers, JJ.
13*th October*, 1924.

L. P. A. No. 26 *of* 1924.

Limitation Act, Art. 125—*Hindu widow—Sham mortgage—Decree and purchase by mortgagee—Suit for declaration of invalidity—Limitation.*

A Hindu widow in possession of her husband's estate executed a sham mortgage and the mortgagee sued on the same, obtained a decree for sale and purchased the same. The presumptive reversioner filed a suit for declaring the mortgage and sale invalid, within 12 years of the date of the sale but more than 12 years after the mortgage. *Held*, reversing the decision in 19 L. W. 564 the suit was barred under Art. 125, Limitation Act, as the cause of action arose on the date of the mortgage and not on the date of sale.

N. S. Rangasami Aiyangar for Appellant.

M. S. Vaidyanatha Aiyar for Respondent.

T. S. V.

The Offg. Chief Justice, Kumaraswami Sastri and Krishnan, JJ. 15th October, 1924. — *R. C. No. 6 of* 1924.

Stamp Act, S. 2 (16) *and Sch. I-A, Arts.* 4 (*c*) *and* 30—*Agreement—Construction—Lease or license—Stamp duty.*

An agreement was entered into between the South Indian Railway Co. and the Chairman, Chidambaram Municipality, for the purpose of allowing the latter to stock coal in the Railway premises. The Municipality was throughout described as the licensee and some of the conditions were that the licensee was to use the land subject to such rules, regulations and bye-laws as may be made by the Company, that the licensee was not to erect any building thereon or store goods other than his own, that the licensee was to allow the Railway Company free access at all times, that the licensee was to pay Rs. 7½ per month or part of a month for a plot 100 ft. by 25 ft., that he was not to transfer or sub-let and there was a clause that " nothing in this license should be construed to create a tenancy in favour of the licensee." *Held*, the agreement was not a lease as defined in S. 2 (16), Stamp Act, and hence not liable to be stamped under Art. 30, Sch. I-A, but fell under cl. 4 (*c*) of Sch. I-A as an agreement not otherwise provided for.

S. S. Ramachandra Aiyar for Railway Company.

The Government Pleader for the Crown.

T. S. V.

The Offg. Chief Justice, Kumaraswami Sastri and Krishnan, JJ. 16th October, 1924. — *Cr. R. C. No.* 937 *of* 1923.

Criminal Procedure Code, S. 145—*Order under—Revision against--Power of High Court to award costs.*

In a revision petition against an order under S. 145, Cr. P. Code, the High Court has no power to award costs to the successful party. 45 Mad. 913 (F. B.) and 39 Cal. 157 referred to.

A. Krishnasami Aiyar and K. Balasubramania Aiyar for Petitioner.

V. L. Ethiraj and A. Srirangachariar for Respondents.

R. N. Aingar for *Public Prosecutor* for the Crown.

T. S. V.

N R C

Madhavan Nair, J.
16th October, 1924. } *C. M. P. No.* 873 *of* 1924.

Insolvency—Suit by unsecured creditor for money due—Defendant becoming insolvent pendente lite—*Official Receiver—If can be impleaded—Civil Procedure Code, O.* 1, *R.* 10 *and O.* 22, *R.* 10 *—If applicable.*

Where during the pendency of a suit by an unsecured creditor for moneys due to him from the defendant, the latter becomes an insolvent, the Official Receiver cannot be impleaded as an additional defendant or substituted in the place of the insolvent either under O. 1, R. 10 or O. 22, R. 10. 25 Mad. 406; 22 Cal. 259 ; 1 B. H. C. R. 251 followed.

G. Krishnaswami Aiyar and R. Swaminatha Aiyar for Petitioner.

N. Kunchidapatham Aiyar for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
20th October, 1924. } *C. R. P. No.* 513 *of* 1924.

Practice—Pleader undertaking not to examine fresh witnesses —Application to issue process—Dismissal—Propriety of.

During the early stage of a trial, the pleader for a party gave an undertaking that he was not going to examine any witnesses other than those who were called before a Commissioner. He subsequently applied for issue of processes for certain witnesses which was adjourned a number of times and finally dismissed on the ground it was contrary to his undertaking. *Held,* an opportunity should have been given to him to examine such witnesses, as he has a right to put before the Court such evidence as he thinks necessary. The practice prevailing in the mofussil Courts of taking undertakings from pleaders and fixing them to it later on, condemned.

C. S. Venkatachari for Petitioner.

K. V. Krishnasami Aiyar for Respondent.

T. S. V.

Devadoss, J.
21st October, 1924. } *S. A. No.* 773 *of* 1923.

Mortgage—Prior and subsequent—Suit by prior mortgagee—Puisne mortgagee not impleaded—Sale—Surplus sale proceeds—Nature of—Rights of puisne mortgagee.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee and brings the properties to sale and after satisfying his own decree, some portion of the sale proceeds still remain, the puisne mortgagee can elect to proceed against such surplus and is not bound to bring the property to sale again. Such surplus sale proceeds partake of the nature of substituted security against which he can proceed, and a simple bond creditor who has drawn out such proceeds prior to the puisne mortgagee's suit can be compelled to refund the same. 41 Cal. 654 (P. C.); 43 All. 268; 18 Bom. 684; 21 Cal. 70 followed; 40 Mad. 77; 33 Cal. 878; 30 Cal. 59 referred to.

Where the contest in the High Court is between the auction purchaser and the simple bond creditor as to the rights of the puisne mortgagee, the Court can under O. 41, R. 33 pass a decree in favour of the puisne mortgagee though he has not appealed or filed memorandum of objections.

S. Varadachari for *K. S. Jayarama Aiyar* for Appellant.

K. V. Krishnasami Aiyar, V. Rajagopala Aiyar, P. V. Krishnasami, T. Krishnasami Aiyangar and S. Sundararaja Iyengar for Respondents.

T. S. V.

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Srinivasa Aiyangar, J.
21st October, 1924. } *C. R. P. No.* 78 *of* 1924.

Civil Procedure Code, S. 10—Scope of—Matter in issue—What is—Some issues alone common—Importance of issue—Stay if can be granted—Intention of Legislature.

In order that S. 10, Civil Procedure Code, may apply, it is not enough if some of the issues, however important they may be, are common to both the suits. 15 L. W. 646 followed. The words "matter in issue" refer to the entire subject-matter of the suits. Intention of the Legislature referred to.

T. S. Viswanatha Aiyar for Petitioner.

C. T. Govindan Nambiar for Respondent.

T. S. V.

Devadoss, J.
22nd October, 1924. } *S. A. No.* 148 *of* 1922.

Civil Procedure Code, O. 6, R. 17—Amendment of plaint—Appeal—Deliberate omission to amend in trial Court—New issues and fresh evidence.

An amendment of plaint will not be allowed in appeal if it is found that the plaintiff deliberately omitted to amend in the trial Court, and especially if such amendment changes the cause of action thus necessitating new issues and fresh evidence. O. 6, R. 17 would not apply to such a case.

The plaintiff sued for possession alleging that reversion to the property had opened to his father after the death of the last female owner. During the trial it turned out that he died even in her life-time but still the plaintiff did not care to amend his plaint. *Held,* he should not be allowed to amend the plaint during the stage of appeal.

S. Srinivasa Aiyar for Appellant.

P. G. Krishna Aiyar for Respondent.

T. S. V.

Venkatasubba Rao and Srinivasa Aiyangar, JJ.
22nd October, 1924. } *C. M. P. No.* 3376 *of* 1924.

Civil Procedure Code, O. 45, R. 7—Security for costs—Immoveable property—Granting of certificate—What is—Application when to be made.

An application that immoveable property may be taken as security for costs under O. 45, R. 7 in an appeal to His Majesty in Council should be made at or before the granting of the certificate. The certificate is granted when the Court passes the order granting leave to appeal and not when the formal certificate is drawn up by the High Court.

T. R. Ramachandra Aiyar and S. Srinivasa Aiyar for Petitioner.

C. V. Anantakrishna Aiyar and K. B. Venkatachela Aiyar for Respondent.

T. S. V.

Venkatasubba Rao, J.
22nd October, 1924. } *S. A. No.* 572 *of* 1922.

Hindu Law—Widow—Alienation fifty years old—Recital in document—Admission of plaintiff.

A widow in possession of her husband's property sold some properties in 1870 and the sale deed contained a recital that it was for the discharge of her husband's debts. The debts were not specified nor was there any other proof of the the same. In a suit by a son of the last owner's divided brother to contest the alienation more than 45 years afterwards, he admitted that no part of the property that fell to his father's share on partition came to him. *Held,* the admission taken along with the recital of 1870 is sufficient to prove necessity.

The tendency to lay undue emphasis on the qualifications to the beneficial principle laid down in 44 Cal. 186 as regards ancient alienations, which should be liberally applied, deprecated.

G. Lakshmanna for Appellant.

K. Ramamurthi for Respondent.

T. S. V.

Devadoss, J.
22nd October, 1924. } *S. A. No.* 1430 *of* 1922.

Indian Succession Act—Suit by husband for properties of deceased wife—Defence of will in favour of another—Probate not taken—Effect—Nature of suit—Provincial Small Cause Courts Act, Sch. II, Art. 28.

The husband of a deceased Christian lady sued for the recovery of moveables left by her. The defendant set up a will by the deceased in favour of a third party. *Held,* the will could be relied on even in the absence of probate. The suit fell within Art. 28 of Sch. II of the Provincial Small Cause Courts Act and hence not being of a small cause nature, there would be a second appeal even where the moveables were worth less than Rs. 500.

P. Somasundaram for Appellant.

V. Suryanarayana for Respondent.

T. S. V.

N R C

Odgers, J.

22nd October, 1924. } S. A. No. 1122 of 1922.

Limitation Act, Arts. 44 *and* 144—*Alienation by guardian of minor—Suit to set aside more than three years after majority—Bar.*

A suit by a minor to set aside an alienation by his guardian filed more than three years after attaining majority is barred, under Art. 44 which governs. 40 M. L. J. 475; 41 Mad. 102; 31 I. C. 811; 28 Mad. 423 followed; 7 M. L. J. 131; 14 Mad. 26 not followed.

M. Ramachandra Rao for Appellant.

V. Suryanarayana for Respondent.

T. S. V.

Venkatasubba Rao, J.

23rd October, 1924. } S. A. No. 1530 of 1922.

Limitation Act, Arts. 139, 144—*Lease—Holding over—Non-payment of rent—Representative of lessee—Transfer of Property Act, Ss.* 111 *and* 116—*Effect of—Evidence Act, S.* 116—*Estoppel.*

In a suit in ejectment filed in 1918 it was found that the defendant's father was holding under a lease which expired in 1902, that thereafter either the defendant or his father were in continuous possession without paying any rent and that no overt act had been done from which a continuance of the tenancy could be presumed. *Held,* (1) the lease having expired under the provisions of Ss. 111 and 116, T.P. Act, Art. 139 Limitation Act, applied to the case and not Art. 144; (2) Art. 139, applies not only to the lessee but to his legal representative also; and (3) under S. 116, Evidence Act, the tenant was estopped from denying the title of the landlord; 33 Mad. 260; 26 C. W. N. 722 followed. 31 Mad. 163 dissented from.

A. C. Shanmuga Nainar for Appellants.

N. A. Krishna Aiyar and K. Venkateswara Aiyar for Respondents.

T. S. V.

Devadoss, J.
23rd October, 1924. } *S. A. No.* 1139 *of* 1922.

Mortgage—Suit by sale for usufructuary mortgagee—Final decree—Suit for redemption by person claiming under mortgagor —If barred.

An usufructuary mortgagee brought a suit for sale on a personal covenant in the deed, and the decree amount not being paid in time, a final decree for sale was passed in 1914. The mortgagee did not take any further steps but remained in possession. In 1920 a person claiming the rights of the mortgagor (a puisne mortgagee *pendente lite* who obtained a decree on his mortgage and became the purchaser at the Court sale) filed a suit for redemption against the usufructuary mortgagee. *Held*, the suit was not barred by *res judicata*. 39 Mad. 896 dist. on the ground that the decree in that case was not executable by the mortgagor, whereas a decree for sale under O. 34, R. 5 is not capable of execution at the instance of the mortgagor.

C. S. Venkatachari for Appellant.

T. L. Venkatrama Aiyar for Respondent.

T. S. V.

Srinivasa Aiyangar, J.
24th October, 1924. } *C. R. P. No.* 696 *of* 1923.

Madras Local Boards Act (XIV of 1920), *Sch. X R.* 15 (3) *—Date fixed by Taluk Board President—Meeting adjourned for want of quorum—Election of President on the adjourned date —Validity—Madras Act II of* 1922*—Taking seat—What is.*

Under R. 15 (3) of Sch. X of the Local Boards Act, the President of the Taluk Board fixed a day for the election of the Union Board President. For want of a quorum the meeting was adjourned to a subsequent date on which day the election was held. *Held*, it was invalid. The expression "taking his seat" in Madras Act II of 1922, S. 2 (1) means entering on the duties of his office.

B. Jagannath Doss for Petitioner.

P. Somasundaram for Respondent.

T. S. V.

Venkatasubba Rao, J.
24th October, 1924.
S. A. No. 813 *of* 1922.

Part-performance—Doctrine of—Applicability—Family settlement.

In a joint family consisting of a person, his sister and her sons, there were disputes due to the last named persons setting up rights to the property on the basis of an *illatom* adoption and in settlement of the disputes the brother executed a deed in favour of his sister and gave her possession of the properties mentioned therein, but the same was not registered. *Held,* on the doctrine of part performance, he could not afterwards sue to recover the same. 42 Cal. 801 ; 39 Mad. 509 ; 46 Mad. 919; 18 A. L. J. 877 followed.

P. Somasundaram for Appellant.

Y. Suryanarayana for Respondents.

T. S. V.

Srinivasa Aiyangar, J.
24th October, 1924.
C. R. P. No. 704 *of* 1923.

Madras Local Boards Act (XIV of 1920), *S.* 55—*Member of village panchayat—If an Honorary Magistrate—Disqualification for election—Madras Village Courts Act, Ss. 76, 77.*

A member of a village panchayat is not a magistrate within the meaning of that term in the General Clauses Act, as he derives his jurisdiction from the Madras Village Courts Act and not the Code of Criminal Procedure. He is not an Honorary Magistrate and is not disqualified under S. 55 (2) (*iv*) of the Madras Local Boards Act from standing for election for a Union Board.

K. S. Sankara Aiyar for Petitioner.

V. Rajagopala Aiyar for Respondent.

T. S. V.

Devadoss, J.
22nd October, 1924.
S. A. No. 466 of 1923.

Inam—Resumption—Darmila service inam—Burden of proof—No evidence when and to whom granted—Presumption as to waram.

The Rajah of Bobbili purported to resume certain lands from plaintiff, alleging they were granted in lieu of wages and issued a notice to him. Later treating the lands as *ryoti* he got a *Kadapa* executed by a tenant, though possession was still with plaintiff, filed a suit for rent under S. 112, Estates Land Act, and brought the lands to sale, whereupon the plaintiff sued for declaration of title and injunction restraining the sale. *Held* (1) the burden of proof was on the Zamindar to show the inam was resumable, and (2) that it was also incumbent on him to prove what he granted, *i.e.*, whether it was only the *melwaram* or both the warams.

Where the evidence let in by the defendant consisted only of a document stating that the holder was performing shroff's service, and an account book of 1890 wherein the lands were described as *Darmila* service inam, *held* the right to resume was not proved.

P. V. Rangaram for Appellants.

A. Krishnasamy Aiyar and K. Satyanarayanamurthy for Respondent.

T. S. V.

Phillips and Odgers, JJ.
30th October, 1924.
A. S. No. 415 of 1923.

Court Fees Act (V of 1922)—Suit for maintenance—Valuation at time of appeal—Forum of appeal.

At the time of the institution of a suit for maintenance, the valuation was above Rs 5,000, but at the time when the appeal was preferred Madras Act V of 1922 had come into force and according to the provisions thereof the valuation of the appeal was less than Rs. 5,000. *Held*, the forum of appeal depended on the valuation at the time of appeal and hence an appeal lay to the District Court. 4 Mad. 220; A. S. No. 32 of 1924 followed.

P. S. Ramaswami Aiyangar for Appellant.

N. S. Srinivasa Aiyar for Respondent.

T. S. V.

N R C

Devadoss, J.
30th October, 1924. } *S. A. No. 322 of* 1922.

Inam—Enfranchisement—Karnam service lands in proprietary estate—Powers of Government in disposal—Grant of patta to other than Karnam—Effect of patta.

The Government enfranchised certain *Karnam* service inams in a proprietary estate and issued patta in the name of nine persons who according to them were in possession and represented the branches of the original family. In granting the patta they ignored the claims of one member who was actually holding the *Karnam* office at that time. He filed a suit for partition and claimed that the enfranchisement enured for his benefit also. *Held,* that the lands were at the absolute disposal of the Government who could enfranchise it in favour of anybody it chose, that the grant of the inam patta to others than the office-holder was legal, that the enfranchisement of service inams was a resumption and a regrant and hence the patta was the root of a fresh title. 22 Mad. 204; 44 Mad. 643; 46 M. L. J. 482 followed; 30 M. L. T. 334 dissented from.

B. Somayya and D. Appa Rao for Appellants.

G. Lakshmanna and A. Satyanarayana for Respondent.

T. S. V.

Devadoss, J.
30th October, 1924. } *S. A. No.* 21 *of* 1922.

Civil Procedure Code, Schedule II, paras 1 *and* 15—"*Parties interested*"—*Meaning of—Relief if should be claimed—Effect of party not joining—Award—If to be set aside—Order under O.* 23, *R.* 1 *after award—Legality of.*

An usufructuary mortgagee brought a suit against two persons alleging they were trespassing on properties mortgaged to him and impleaded therein the mortgagor also as defendant. The matter was then referred to arbitration, but the mortgagor was not a party to the reference though he subsequently appeared before the arbitrator. An award was passed against the plaintiff whereupon he applied to the Court for permission to withdraw the suit with liberty to file fresh suit and this was granted. He filed a second suit and the defence was that there was a valid award which had not been set aside in the manner

provided for in the Code. *Held,* (1) the mortgagor not having been a party to the reference, the arbitration proceedings were invalid. The facts that the mortgagor would only be ultimately benefited and that no relief had been claimed against him in the plaint do not militate against his being a "party interested" within the meaning of para. 1 of the second Schedule; (2) as there was an initial absence of jurisdiction, the mere fact that the mortgagor appeared before the arbitrator does not amount to acquiescence and cannot remedy the defect; and (3) the reference to arbitration being invalid, there is no necessity to have the award set aside and as there was a proper order under O. 23, R. 1 the subsequent suit was maintainable.

21 C. W. N. 387; 42 Mad. 632; 6 A. L. J. 351 followed.

T. L. Venkatrama Aiyar for Appellant.

S. Doraiswamy Aiyar and V. Thyagaraja Iyer for Respondent.

T. S. V.

Wallace, J.
30th October, 1924. } *Cr. A. No.* 328 *of* 1924.

Madras Local Boards Act (XIV of 1920), *Ss.* 170, 171, 175, 179—*Market—What is—Market opened before Act came into force—If a new private market—Disturbance of market rights—Offence.*

Where arecanuts were brought to a private house, weighed and sold to the owner or to other people, the place constitutes a market. Where such a place had been opened even before Act XIV of 1920 came into force, it does not amount to opening or keeping open "a new private market" within the meaning of S. 170, Madras Local Boards Act.

Such a place, even if it were not a market under the old Act, would fall under the terms "Market lawfully established at the commencement of this Act" in S. 171 and in the absence of a license obtained from the Board the person keeping it open would be liable under the section.

What amounts to disturbance of market rights considered.

The Public Prosecutor (J. C. Adam) for the Crown.

D. A. Krishna Wariar for Accused.

T. S. V.

Phillips and Odgers, JJ.
5th November, 1924.

A. S. No. 218 of 1923.

Malabar Law—Karar—Junior members—Agreement to be bound by terms—How far binding.

It is open to the junior members of a Malabar tarwad to enter into a *Karar* that they would be bound by all its terms till it is set aside or superseded by another registered *Karar.*

Where a *Karar* recited that its terms would be binding on the *Karnavan* and the junior members of an *illom* for all time, it is binding not only on the then *Karnavan* but on all future *Karnavans* as well. 32 M. L. J. 323 explained.

C. V. Anantakrishna Aiyar and P. S. Narayanaswamy Aiyar for Appellants.

T R. Ramachandra Aiyar, C. S. Swaminatha Aiyar and P. S. Ramachandra Aiyar for Respondents.

T. S. V.

Devadoss and Madhavan Nair, JJ.
6th November, 1924.

S A. No. 474 of 1922.

Inam—Musician service in temple—Sale by inamdars—Effect of—If void—Public policy.

The suit properties constituted temple service inam lands, the particular service being playing music before the village goddess. The inamdar first mortgaged the land and subsequently sold the same. When the vendee sued in redemption, the mortgagee objected to the maintainability of the suit. *Held* (1) the alienation of a religious service inam by way of sale was void as being contrary to public policy; and (2) the alienation was not valid even during the life-time of the inamdar—office-holder. 45 Mad. 620 (F. B.) followed ; 15 M. L. J. 10 ; 28 M. L. J. 303 ; 41 Mad. 749 ; 19 M. L. T. 144 referred to.

E. Krishnamurthi for Appellant.

K. Rajah Aiyar for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
6th November, 1924. } *C. M. A. No.* 412 *of* 1923.

Criminal Procedure Code, Ss. 195 *and* 476—*Complaint—Chief Judge of Small Cause Court—Appeal—Where lies—Original Side or Appellate Side.*

The Chief Judge of the Small Cause Court at Madras directed a complaint to be filed under S. 476, Criminal Procedure Code, against certain persons for fabricating false evidence and using it. Against this order an appeal was filed to the High Court, Appellate Side, whereupon objection was taken that the appeal was not competent. *Held* (1) the appeal lay to the High Court and not to a Full Bench of the Small Cause Court, as the latter cannot be said to be a Court to which appeals ordinarily lie. 34 Bom. 316 followed; (2) the appeal lay to the Appellate Side of the High Court and not to the Original Side. 36 Mad. 138 followed; 45 Mad. 928 (F.B.) distinguished. The High Court is one Court exercising ordinary Original Civil Jurisdiction within the meaning of S. 195 (3), Criminal Procedure Code, and the Original Side is not a distinct Court but only a part of the High Court.

S. T. Srinivasagopalachari for Appellant.

P. Govinda Menon for *Crown Prosecutor and M. Krishna Bharati* for Respondents.

T. S. V.

Ramesam, J.
6th November, 1924. } *S A. No.* 136 *of* 1921.

Evidence Act, S. 32 (5)—*Inam proceedings—Statement and pedigree filed by Hindu widow—Signature of nephew—If admissible—Special means of knowledge—Proof of—Entries in Inam Register—If admissible.*

In accordance with the *Inam* rules, certain statements and pedigrees were filed by a Hindu widow who held the *Inam* at the time of the *inam* proceedings. They purported to be by her, but were actually signed by her brother's son. *Held,* they could not be admitted in evidence to prove relationship as statements of the widow under S. 32 (5) as they were not signed by her; nor were they admissible as statements of the nephew as one having special means of knowledge, since special knowledge can be presumed only in the case of blood relations and

persons directly related by marriage, such as sons-in-law.' In other cases special means of knowledge must be proved as a fact.

Entries regarding relationship in the *Inam* fair register, made as a result of the Inam Commissioner's enquiry stand on a different footing and are admissible to prove relationship.

G. Lakshmanna for Appellant.

A. Krishnasami Aiyar and V. Govindarajachari for Respondent.

T. S. V.

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Venkatasubha Rao and Srinivasa Aiyangar, JJ. *6th November*, 1924. — *A. S. No.* 257 *of* 1919.

Grant—Construction—Pre-settlement service grant—If one in lieu of wages or burdened with service—Tests for determining—Presumption.

About 1750 the predecessor-in-title of the Maharaja of Vizianagram granted a village to certain persons. From 1840 onwards a fixed *Kattubadi* was being levied. The grantees had to attend on the Rajah at Dasara, etc., with a number of retainers for which they received batta while on duty. The lands had never been resumed, but were enjoyed hereditarily with rights of alienation. In 1870 the descendants of the grantee executed a document wherein they said they " held the lands at the will and pleasure of the Rajah and so long as he pleased." In a suit by the Rajah for resumption on the ground of default in rendering services, *Held* per *Venkatasubba Rao, J.* (Srinivasa Aiyangar, J. *contra*) the grant was one burdened with service and not in lieu of wages. 29 Mad. 52 (P.C.) followed; 14 Mad. 365; (1910) M. W. N. 436; 1 L. W. 662; 30 M. L. J. 132; 38 Mad. 620 referred to.

The question whether there is a right of resumption in the Rajah depends on whether the village was treated as revenue-paying land at the time of the Settlement; if it was included in the *mal* assets the Zemindar has the power to resume and if not, the Government has the power. 10 M. I. A. 16; 13 M. I. A. 478 referred; and whether services were public or private, 20 M. L. J. 728; (1913) M. W. N. 959 referred to. The right could be established only by proving that the village was included in the Zemindari at the Settlement and that the grant was in lieu of wages or if burdened with service that there was default in rendering the same. 28 Bom. 305; 17 L. W. 514; 13 M. I. A. 438 referred to; there is no presumption in favour

of the Zemindar that the grant is in lieu of wages, if it was included in the *mal* assets. 13 M. I. A. 438; 28 Bom. 305 ; 17 L. W. 514 followed ; 22 Cal. 938 dissented from.

Per Srinivasa Aiyangar., J.—The fact that the property is within the ambit of the Zemindari raises a presumption of its being included in the same at the time of the Permanent Settlement. 42. Cal. 710 followed.

To find out if a grant is in lieu of wages or one burdened with service one must look to the primary intention of the grant ; resumptions or attempted resumptions ; names by which lands are described ; nature of the services ; whether included in the *mal* assets ; treatment by parties, etc.

The expression "at the will and pleasure of the Rajah and so long as he pleased" governed the deed and was not a mere suggestion of inferiority (*contra* per Venkatasubba Rao, J.)

S. Srinivasa Aiyangar and R. Ganapathi for Appellant.

G. Lakshmanna and V. Viyyanna for Respondents.

T. S. V.

Devadoss, J.
7th November, 1924. } *S. A. No.* 1471 *of* 1922.

Limitation Act, Arts. 36, 132—*Mortgage of land and house—Subsequent sale of house by mortgagor—Demolition of house—Suit by mortgagee—Decree—Form of.*

A piece of land and the house situated thereon were mortgaged to the plaintiff and subsequently the mortgagor sold the house to the second defendant who demolished the same and removed the materials. The plaintiff brought a suit on his mortgage within 12 years of the same impleading the mortgagor and his vendee. *Held,* the suit was in time under Art. 132, Limitation Act, and did not fall under Art. 36 ; the vendee from the mortgagor was in the same position as the mortgagor and the proper decree was one for sale of the land and if the sale proceeds were not sufficient a decree against the vendee for the balance.

3 L. W. 341 distinguished ; 41 Cal. 654 (P.C.) and S. A. No. 773 of 1923. (47 M. L. J., Notes of Recent Cases, p. 67) referred to.

V. Krishna Mohan for Appellant.

K. Krishnamachari for Respondent.

T. S. V.

Devadoss, J. •
13th November, 1924. } *S. A. No.* 1075, *etc., of* 1922.

Madras Estates Land Act, Ch. XI—Proceedings under—Desapandya inams *in the Pittapur estate—Entry as part of estate—Suit challenging—Nature of inams—If included in assets at Permanent Settlement—Reversal of decree in favour of non-appealing parties—If proper.*

In proceedings under Chapter XI, Estates Land Act, instituted by the Pittapur Zemindar, lands which *Desapandya Inamdars* owned for more than a century were shown as part of the Zemindari and the tenants as having occupancy rights. The inamdars sued for declaring the proceedings invalid. The trial Court held *desapandya inams* were pre-settlement inams and were excluded from the assets of the Zemindari at the Permanent Settlement and that the tenants had no occupancy rights. The Zemindar alone appealed and the Appellate Court not only declared that the inams formed part of the estate, but declared the existence of occupancy rights in the tenants who had not appealed. *Held* (1) the *Russoms* by which the *Desapandyas* were paid before the Permanent Settlement were alone included in the assets of the Zemindari at the date of the Permanent Settlement and as these inams were unauthorised alienations by the superiors to *Desapandyas* they were not dealt with by the Government at the time of the Permanent Settlement, and (2) in the absence of an appeal by the tenants, the Lower Appellate Court ought not to have reversed the decree negativing their occupancy rights.

Fifth Report, Vol. III, p. 24; C. R. P. No. 199 of 1918; S. A. No. 1826 of 1918 followed.

C. Rama Rao, V. Viyyanna, D. Appa Rao and B. Somayya for Appellants.

A. Krishnasami Aiyar for Respondent.

T. S. V.

The Officiating C. J. and Srinivasa Aiyangar, J. 2nd November, 1924.

O. S. A. No. 80 *of* 1922.

Sale of goods—C. I. F.—Kernel ports to Marseilles—Force majoure *clause—Commandeering—Impossibility of obtaining freight—If within exception clause.*

The defendant H. P. entered into a contract with the plaintiffs B, a firm of merchants in Marseilles, for the sale of 400 tons of groundnuts of the H. P. brand C. I. F. Kernel ports to Marseilles. Shipment to be in December-January, 1917. The contract contained an exception clause in the following terms :—" In case of prohibition of exportation out of the countries of origin of blockade or any other case of *force majoure* preventing the execution of the present contract the bargain shall become null for the whole or the part not yet executed."

S. S. Seapool, the steamer by which the defendant had booked the necessary freight, was commandeered by the Government on November 14. And thereafter the defendant in spite of all efforts was unable to procure freight for shipping the goods. In an action for damages for non-performance, *Held, per the Officiating Chief Justice,* that the impossibility of procuring freight absolved the defendant from performance of the contract under the *force majoure* clause.

(1915) 1 K. B. 681; (1920) 2 K. B. 714 and (1917) A. C. 495 followed.

(1919) 2 K. B. 778 referred to.

Per Srinivasa Aiyangar, J.—The contract having been entered into during war, the mere difficulty or even the impossibility of procuring freight was no defence ; but the commandeering taken with the event that followed, was the effective cause of the non-performance and the defendant therefore was not liable.

The mode of performance was an essential part of the contract and the contract could not have been properly performed either by tendering goods at Marseilles or by tendering documents relating to other goods from the Kernel ports. The words "H. P. Brand" implied the exercise of personal skill of the defendant in the selection of the goods.

Vere Mocket for Appellants.

The Advocate-General and S. Gurusami Chettiar for Respondents.

C. A. S.

N R C

Wallace and Madhavan Nair, JJ.
11th November, 1924. } *C. R. P. No.* 695 *of* 1922.

Civil Procedure Code, Ss. 92, 115—*Trustee of temple—If can sue for removal of other trusteees and for scheme—Interference in revision.*

It is open to the trustee of a temple along with another person interested in the same to file a suit to remove the other trustees and for framing a scheme, after getting the sanction of the Advocate-General under S. 92, Civil Procedure Code.

The question of the maintainability of such a suit is in reality a question of jurisdiction and can be inquired into under S. 115, Civil Procedure Code.

S. Muthiah Mudaliar and K. Narasimha Aiyangar for Petitioner.

K. V. Krishnasamy Aiyar and S. Panchapakesa Sastry for Respondent.

T. S. V.

Spencer and Devadoss, JJ.
11th November, 1924. } *C. M. P. No.* 3753 *of* 1923.

Civil Procedure Code, O. 47, *R.* 1—*Different view of the law by higher authority—If a good ground for review—Execution sale—Illegality—Limitation Act, Arts.* 166 *and* 181—*Which applies.*

In an application to review the decision in 47 Mad. 525 45 M. L. J. 829 (which held that Art. 166 of the Limitation Act and not Art. 181 applied to applications to set aside execution sales on the ground of illegality) the ground relied upon was that the decision of the Full Bench in 47 Mad. 288 had laid down a different position of law. *Held*, even assuming the earlier decision to be wrong, which it was not, a subsequent exposition of law in a different way was no ground for review.

K. Balasubramania Aiyar for Petitioner.

P. V. Krishnasamy Aiyar for Respondent.

T. S. V.

Ramesam, J.
13th November, 1924. } *S. A. No.* 1516 *of* 1922.

Landlord and tenant—Covenant to sink well—Breach of—If entitles tenant to put an end to tenancy.

Where a landlord covenants with his tenant that he would sink a well within a certain time, but fails to do so, the omission

does not entitle the tenant to terminate the tenancy. His right, if any, is only for damages. Foa's *Landlord and Tenant* (20th Edition), p. 213 and 7 Man. and Gra. 576 followed.

T. L. Venkatrama Aiyar for Appellant.

K. Rajah Aiyar and *V. Ramasamy Aiyar* for Respondent.

T. S. V.

Ramesam, J.
13th November, 1924. } *S. A. No.* 851 *of* 1922.

Surveys and Boundaries Act, S. 13—*Decision of appellate authority—Binding nature of—Notice of order.*

A *prima facie* case of title and possession found in favour of a party by an appellate authority in proceedings under S. 13 of the Surveys and Boundaries Act will be upheld in subsequent proceedings in a Civil Court. 70 I. C. 672 followed.

Even if it is proved that such order was never communicated to the defeated party, it is sufficient to shift the burden of proof to him.

T. V. Muthukrishna Aiyar for Appellant.

P. V. Krishnasamy Aiyar for Respondent.

T. S. V.

Ramesam, J.
13th November, 1924. } *S. A. No.* 1718 *of* 1922.

Malabar Law—Gift by father in favour of eldest daughter—Maintenance of his wife and children—If Puthravakasam *property.*

Where a father under Malabar Law grants property to his eldest daughter for the maintenance of his wife and children it constitutes *Puthravakasam* property. 39 M. 317 (F. B.) referred to.

C. V. Anantakrishna Aiyar and K. P. Ramakrishna Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

T. S. V.

Spencer and Srinivasa Aiyangar, JJ.
13th November, 1924. } *O. S. A. No.* 85 *of* 1923.

Presidency Towns Insolvency Act, Ss. 30 (2), 45—*Secured creditor—Rights of—Composition with approval of Court—Discharge—Right to proceed against insolvent—Suit or application to Insolvency Court.*

The majority of the creditors of an insolvent entered into a composition with him with the approval of the Court under which they were to receive 8 annas in the rupee and thereupon the adjudication was annulled. A secured creditor who had not been served with notice of either the adjudication or the annulment instituted a suit to recover the money first against the security and then against the debtor personally. *Held,* such a suit was the proper remedy in India, and the creditor's remedy was not by way of application to the Bankruptcy Court. English Law considered. 22 Q. B. D. 90 ; 1 C. P. 111 ; 2 Ch. D. 485 ; 11 Q. B. D. 559 ; 19 Ch. D. 395; (1896) 1 Ch. D. 904; 7 C. P. 519 referred to.

C. V. Anantakrishna Aiyar and *K. Doraisamy Aiyangar* for Appellant.

A. Ramachandra Aiyar for Respondent.

T. S. V.

Spencer and Srinivasa Aiyangar, JJ.
13th November, 1924. } *A. S. No.* 70 *of* 1921.

Executor—Will by Hindu in the mofussil—Powers of executor—Probate not taken—Effect.

Their Lordships referred to a Full Bench the question whether an executor under a will executed by a Hindu in the mofussil has, prior to taking probate of the will, all the powers of an executor under the Probate and Administration Act vested in him or whether his powers are only those of a manager under the law.

A. Krishnasami Aiyar for Appellants.

The Advocate-General, V. Viyyanna, G. Lakshmanna and V. Suryanarayana for Respondents.

T. S. V.

Venkatasubba Rao, J.
13th November, 1924. } *S. A. No.* 223 *of* 1922.

Civil Procedure Code, S. 11, *Expl. IV—Suit by agent against principal—Principal's claim for damages—Equitable set off—Failure to plead—Effect—If bars fresh suit.*

In a suit by an agent against his principal, the latter who had a right to claim damages as against his agent and which he

could have claimed as equitable set off failed to set it up. He subsequently brought a suit claiming those damages. *Held,* the principle of S. 11, Expl. IV did not apply and the suit was not barred. Principles underlying legal and equitable set off considered. 45 E. R. 795; 6 Q. B. D. 687; 28 M. L. J. 513 followed; 16 Cal. 682 (P.C.) and 12 L. W. 173 distinguished.

B. Somayya for Appellant.

A. Krishnasami Aiyar for Respondents.

T. S. V.

Wallace and Madhavan Nair, JJ.
13th November, 1924.

S. R. No. 19696 *of* 1922.
C. M. P. No. 465 *of* 1923.

Limitation Act, S. 12 (2)—*Party applying for copy of judgment and decree at different times entitled to a deduction of time spent in obtaining both.*

The judgment of the lower appellate Court was delivered on 27th April, 1922. An application for copy of the decree was filed on 28th April, 1922 and copy of the decree was ready on 10th August, 1922. An application for copy of the judgment was filed on 28th April, 1922, but it was struck off for default on 21st July, 1922. A second application for copy of the judgment was filed on 27th July, 1922 and the copy was ready on 14th November, 1922. The second appeal was filed with the copies of the judgment and decree on 20th November, 1922 and it was contended that it was filed out of time. *Held,* that the appellant was entitled to deduct the period from 28th April, 1922 to 14th November, 1922 which was the aggregate period taken for obtaining copies of the decree and judgment. The application for copy of the judgment having been made on 27th July, 1922 when the application for copy of the decree was pending though more than 90 days from the date of delivery of judgment, the appellant was entitled to deduction of the time spent in obtaining the copy of the judgment also. In the result the appeal was held to have been filed in time. 33 M. 256; 25 B. 586; 1923 Pat. 235 relied on. 43 M. L. J. 765 (P.C.) distinguished.

N. Swaminatha Aiyar for Petitioner.

R. Kesava Aiyangar for Respondent.

A. V. V.

Devadoss, J.
14th November, 1924. } *S. A. No.* 1078 *of* 1922.

Civil Procedure Code, S. 11—*Claiming under the same title—Prior suit by temple against mortgagor—Auction sale by mortgagee and purchase—If title found in prior suit* res judicata.

A certain person purporting to be the owner of certain properties mortgaged them successively to two persons, who jointly assigned their rights to another. Prior to the second mortgage a suit was filed against the mortgagor by the trustees of a temple for a declaration that some of the properties comprised in the mortgage belonged to the temple and for possession. This was decreed and the decision affirmed in appeal and second appeal. Pending this suit, the assignee mortgagee brought a suit on his mortgage and brought the properties to sale. The purchaser then sued the temple trustees for possession, whereupon they pleaded *res judicata. Held,* the Court auction purchaser who acquired the rights of both the mortgagor and mortgagee could not be said to claim under the mortgagor who alone was party to the prior suit and hence the decision therein was not *res judicata.* 8 All. 324 ; 40 Bom. 679; Duchess of Kingston's Case, 2 Smith's Leading Cases, 731 referred to.

A. Krishnasamy Aiyar, K. Sundara Rao and P. Vedachala Aiyar for Appellant.

B. Sitarama Rao for Respondents.

T. S. V.

Srinivasa Aiyangar, J.
14th November, 1924. } *C. R. P. No.* 448 of 1922.

Civil Procedure Code, O. 21, *R.* 89—*Setting aside sale—Application—Necessity for — Lodgment depositing amount—If sufficient.*

Without an application, oral or written, an execution sale cannot be set aside under O. 21, R. 89, Civil Procedure Code. A mere lodgment depositing the decree amount is not such an application. 3 L. W. 174 ; 66 I. C. followed.

P. S. Narayanasamy Aiyar for Petitioner.

B. Sitarama Rao and S.R. Muthusamy Aiyar for Respondent.

T. S. V.

Spencer and Kumaraswami Sastri, JJ.
17th November, 1924. } *A. S. No. 64 of 1920.*

Hindu Law—Religious Endowment—Trusteeship—Succession —Heirs of grantee—Turns of management—Provision for—Hindu widow—Accumulations from savings of husband's estate—Accretion—Succession to Stridhanam—*Husband's heirs—Illegitimate sons of a Sudra, whether entitled.*

Where prior to the annexation by the Government of the Raj of Tanjore, certain Devasthanams were managed by the Rajahs of Tanjore for the time being and after the annexation the Government restored the Devasthanams in 1863 to the senior widow of the late Rajah of Tanjore to be held by her as trustee. *Held,* that the trusteeship of the Devasthanam having been annexed to the Raj before its extinction was presumably impartible ; that the Government in making the grant did not express any intention to take away the impartible character of the property. 12 M. I. A. 1, 37 ; 3 M. 290, 308 (P. C.) referred to ; that having regard to the origin of the estate, the law governing the devolution of trusteeship of public endowments at the time of the grant and the subsequent usage of the institution, the trusteeship was incapable of being held by all the heirs of the late Rajah either jointly or by turns, but it devolved on the seniormost male descendant of the late Rajah. 1 M. H. C. R. 415 ; 20 B. 495 ; 27 M. 192 ; 29 M. 283 ; 41 M. 296 ; 44 M. 205 referred to.

Where a Hindu widow in possession of her husband's estate acquires property from the income of that estate, the question whether she intended to incorporate it with her husband's estate or to retain absolute dominion over it, is one of intention. Where the widow was not in possession of the estate which was all along managed by a Receiver and she took merely a life-interest in the estate under the terms of a grant, and the acquisitions by her were made indiscriminately from the income of the estate as well as pensions granted to her by Government, *held,* that the acquisitions of the widow were her *stridhanam* property and devolved as such on her death. 2 I.A. 256 ; 10 C. 324 ; 14 C. 387 ; 42 M. L. J. 253 (P. C.) distinguished. 20 C. 433 ; 25 M. 351; 28 M. 1 ; 42 M. 581, 588 ; 46 M. 119 followed.

The law is well settled that the illegitimate sons of a Sudra cannot succeed collaterally to their father. Consequently

the illegitimate sons of a Sudra cannot claim to succeed to the *stridhanam* properties of their putative father's legally married wife. They are not "Sapindas" within the meaning of the texts of Hindu Law giving a right of inheritance to the husband's "Sapindas" in matters of succession to the *Stridhanam* of a married woman. 36 M. 116; 37 M. 293; 30 B. 431; 41 M. 44 distinguished. 10 M. 334; 21 All. 99; 25 M. 429; 38 M. 1144; 44 B. 185; 46 B. 424 relied on.

A. Krishnaswami Aiyar and P. S. Chandrasekhara Aiyar for Appellant.

A. V. Visvanatha Sastri for Respondent.

A. V. V.

Ramesam, J.
17*th November*, 1924. } *S. A. No.* 1679 *of* 1922.

Contract—Sale of goods—Title when passes—Goods sent by Railway in vendor's name—Railway receipt passed to Bank—Damage in transit—Liability.

As per order for certain goods from a mofussil station, the defendant sent goods from Madras by rail, booking them to himself at his own risk. He sent the Railway receipt to a Bank at the mofussil station and directed the Bank to deliver the receipt to the plaintiff after their price was paid. The plaintiff paid the price and took delivery of the goods. He found them damaged and sued for loss. *Held*, as the defendant kept the *jus disponendi* in himself by taking the Railway receipt in his own name, the property in the goods did not pass to the plaintiff during the transit and hence defendant alone should bear the loss. 42 Cal. 334; 42 All. 619; 70 I. C. 138; 2 Ex. 1; 3 Ex. 164 referred to.

P. Satyanarayana Rao for Appellant.

Md. Ibrahim Sahib and G. Ramakrishna Iyer for Respondent.

T. S. V.

Ramesam and Venkata-subba Rao, JJ.
18th November, 1924.

S. A. No. 686 *of* 1922.

Easements Act, Ss. 13, 15—*Easement of necessity—Period of enjoyment—If can be tacked on to acquire easement by prescription.*

The period during which an easement of necessity has been enjoyed by a certain person cannot be tacked on, in computing the period for the acquisition of an easement by prescription.

S. Subramania Sastry for Appellant.

P. Somasundaram for Respondents.

T. S. V.

Ramesam, J.
18th November, 1924.

S. A. No. 1491 *of* 1922.

Railways Act—Consignment of goods—Risk Note B—Burden of proof—Loss—Company to produce all material witnesses—Wilful neglect—Failure to stop train when door was found open.

Certain bales of yarn were consigned for carriage under Risk Note B form and as there was short delivery by one bale, the suit was filed for damages against the Company. It was proved that while the train was running the guard saw the door of the goods waggon open, but instead of stopping the train then and there proceeded to the next station and then only looked to the matter. *Held*, in all such cases, the Railway Company should produce as material witnesses all their servants who were in a position to give evidence relating to the disappearance of the goods and thus afford the plaintiff to elicit facts by cross-examination. The Company is to give *prima facie* evidence that the goods are not with them and thereupon the plaintiff will have to prove the loss was due to wilful default of the Company or its servants and it is not enough to show loss could not be due to other reasons. *Held also* on the facts the negligence in shutting the door when it was found open amounted to wilful neglect. 25 Bom. L. R. 350; 18 L. W. 322; 39 All. 418; 23 Bom. L. R. 525; 45 Bom. 211; 47 Bom. 155; 45 All. 56, 380, 530; 51 Cal. 615; 74 I. C. 431 referred to.

N R C

What amounts to "wilful neglect" considered. (1905) 2 K. B. 532; 87 L. J. 234; 1 C. P. 612; 31 Ch. D. 161 considered.

O. T. G. Nambiar for *Messrs. Moresby and Taylor* for Appellant.

L. A. Govindaraghava Aiyar for Respondent.

T. S. V.

The Chief Justice and Srinivasa Aiyangar, J.
18th November, 1924.
O. S. A. No. 117 *of* 1923.

Company—Shares—Application under conditions—Allotment in the usual course—Rights and liabilities of parties.

A cashier in a Company in lieu of security applied for 100 shares which were only half paid up, but he expressly stipulated the balance was not to be called. The Directors did not know of this stipulation, but allotted shares in the usual course. The Company subsequently went into liquidation and the cashier was sought to be made liable as a contributory. *Held*, the stipulation as to the balance of the share money was a term of the contract and as the Directors did not know of it, there was no valid and complete contract to take shares. The cashier was therefore not liable, but could claim as a creditor for moneys advanced. 3 Ch. 633 followed.

T. R. Ramachandra Aiyar and N. R. Sesha Aiyar for Appellant.

K. Bhashyam Aiyangar and V. Raghunatha Sastriar for Respondent.

T. S. V.

Krishnan, J.
19th November, 1924.
C. R. P. No. 250 *of* 1924.

Court-Fees Act, 1870, *Schedule II, Art.* 17, *Cl. (vi)—Suit under Sec.* 92 *of the Civil Procedure Code for a scheme and for accounts against trustees and to direct them to pay the trust a sum of money—Court-fee payable on the plaint—Civil Procedure Code, Sec.* 115*—Interference in revision on the question of Court-fees at an interlocutory stage.*

Held, in a suit under Sec. 92 for a scheme and accounts being ordered against the trustees and for making them pay to

the trust a sum of Rs. 1,100 approximately due by them to the trust, Court-fee is Rs. 10 under Schedule II, Art. 17, Cl. (*vi*) of the Court-Fees Act, 1870, and not an *ad valorem* fee, the High Court can interfere in revision under Sec. 115 of the Civil Procedure Code as it is a question of jurisdiction and it is desirable that the matter should be set right at that stage, instead of the plaintiffs being compelled to disobey the order and have the suit rejected and then prefer an appeal from the dismissal of the suit.

S. Ramaswami Aiyar for Petitioner.

P. V. Krishnaswamy Aiyar for Respondents.

C. A. S.

Krishnan, J.
19th November, 1924. } *C. R. P. No.* 83 of 1924.

Limitation Act, Arts. 7, 102—*Malabar* Kariasthan—*If a household servant—Suit for wages—Limitation.*

In a suit for salary by a Malabar *Kariasthan* whose duties were to collect rent, draft renewal deeds and who was to be paid in kind after his personal expenses were met at the master's house, *held* he was not a household servant and hence Art. 102 and not Art. 7 would apply to the suit.

P. Govinda Menon for Petitioner.

P. G. Krishna Aiyar for Respondent.

T. S. V.

Spencer, J.
20th November, 1924. } *C. R. P. No.* 627 *of* 1922.

Civil Procedure Code, S. 115—*Errors in decree—Not noticed in appeal—Amendment—Powers of Appellate Court—Refusal to correct—Interference.*

Where the decree of a Trial Court is confirmed in appeal, the only Court that can correct errors in the decree which were not noticed at the time of the hearing of the appeal is the Appellate Court, for in such a case the former decree is merged in that of the Appellate Court. 18 Bom. 452 followed.

Where the Appellate Court refuses to correct such errors on the ground they were not made the subject of attack in

appeal or by way of cross-appeal, it refuses to exercise a jurisdiction vested in it by law and the order is revisable. 37 All. 323 followed.

P. Govinda Menon for Petitioner.

D. A. Krishna Wariar for Respondent.

T. S. V.

Wallace and Madhavan Nair, JJ.
20th November, 1924. } *Cr. A. No.* 387 *of* 1924.

Criminal Procedure Code, S. 476—*Complaint by Sessions Judge against witness for perjury—What it should contain.*

Where there was some discrepancy between the evidence given by a witness in the committing Magistrate's Court and that given in the Sessions Court, and the Sessions Judge drew up a complaint under S. 476, Cr. P. C., for perjury, in which he extracted the major portion of the evidence, without stating exactly which particular statements were inconsistent,

Held, the Sessions Judge ought to have extracted the particular statements alleged to be inconsistent and obtained an explanation from the witness before he filed the complaint.

K. P. Ramakrishna Aiyar for Appellant.

The Public Prosecutor for Respondent.

T. S. V.

Krishnan, J.
24th November, 1924. } *C. M. S. A. No.* 7 *of* 1924.

Lis pendens—*Applicability of—Mortgage suit—Purchaser under a simple money decree after preliminary decree but before sale—Position of.*

After the preliminary decree on a mortgage but before sale, the properties were purchased by a person in execution of a money decree, and when the purchaser in execution of the mortgage decree applied for delivery of possession, the money decree purchaser objected under O. 21, R. 100. *Held*, the sale in his favour was affected by *lis pendens* as it is well settled that for the purposes of that doctrine, a mortgage suit continues even after decree till the sale has become final. 15 C. W. N. 672 ; 2 C. L. J. 288 ; 29 All. 76 ; 20 M. L. T. 512 followed ; 37 Bom. 721 dissented from.

The money decree purchaser being the representative in interest of the mortgagor is bound by the order for sale.

G. Lakshmanna and V. Viyyanna for Appellant.

V. Subramanyam for Respondent.

T. S. V.

The Chief Justice and Srinivasa Aiyangar, J. 24th November, 1924. } *O. S. A. No.* 109 *of* 1923.

Letters Patent, Cl. 12—*Lands in the moffusal dedicated to charity—Accounts of the charity to be at Madras for three months every year for inspection—Suit for removal of trustee and accounts on the Original Side—Suit, whether one for land.*

Certain lands in Trichinopoly District were dedicated to certain charities to be performed in that District and under the terms of the trust, the accounts of the charity were to be in Madras for 3 months every year for inspection. In a suit in the Original Side of the High Court by one branch of the founder's family against the managing trustee and the other branches of the family all the parties being residents of Madras for an account of the management by the managing trustee for his removal from management for a scheme and for the appointment of a Receiver pending disposal of the suit, *held,* the suit was not a suit for land within the meaning of clause 12 of the Letters Patent and the High Court in its Original Side had no jurisdiction to try the same.

The Advocate-General for Appellant.

Messrs. Grant and K. S. Narayana Aiyangar instructed by *Messrs. Grant and Greatorex* for Respondents.

C. S. A.

Spencer, J. 24th November, 1924. } *S. R. No.* 1980 *of* 1924.

Court-Fees Act (Madras Act V of 1922), *S.* 7 (*iv*) *A.—Suit for declaring will by last owner was a forgery—If a suit for cancellation.*

A suit by a Hindu widow for a declaration that a will alleged to have been executed by her husband was a forgery and for no consequential relief cannot be considered to be in

substance a suit for cancellation and the case would not fall under S. 7 (iv) A of the Court-Fees Act.

A. Krishnasami Aiyar and K Subramanya Aiyar for Appellant.

The Government Pleader for the Crown.

T. S. V.

Spencer, J.
24th November, 1924. } *S. R. No.* 3751 *of* 1924.

Court-Fees Act (Madras Act V of 1922), *Sch. II, Art.* 17-A. *—Suit to declare alienation invalid—Alienee given credit for consideration paid—Appeal by alienee attacking declaration and claiming charge—Court-fee.*

In a suit for a declaration that an alienation made by the last holder of an impartible Zemindari was not valid beyond his life time, the Court granted the declaration and also added that the alienee was entitled to recover the price paid by him. The alienee appealed, challenging the declaration granted and in the alternative claiming a charge on the properties. *Held,* Court-fee on the memorandum of appeal should be paid according to Art. 17-A of Schedule II.

A. Krishnasami Aiyar and *M. Balasubramanya Mudaliar* for Appellant.

The Government Pleader for the Crown.

T. S. V.

Wallace and Madhavan Nair, JJ.
25th November, 1924. } *C. R. P. No.* 639 *of* 1923.

Civil Procedure Code, O. 38, *R.* 5*—Attachment before judgment—Property in Agency tract—Power of ordinary Civil Courts.*

Ordinary Civil Courts in the Madras Presidency governed by the Civil Procedure Code cannot attach before judgment immoveable properties situate in the Agency tracts, which are Scheduled districts to which the Code of Civil Procedure does not apply. 42 Mad. 813 (P.C.) ; 16 L. W. 669 applied and followed.

G. Lakshmanna and S. Subramania Sastry for Petitioner.

Y. Suryanarayana for Respondent.

T. S. V.

Krishnan, J.
25th November, 1924. } *C. R. P. No.* 246 *of* 1924.

Madras District Municipalities Act (V of 1920) — *Rules framed for the preparation of Electoral Rolls, R.* 8 (*e*)—*How far binding in election enquiries—Order directing evidence as regards candidate's right to be on the rolls—Interference—Civil Procedure Code, S.* 115.

In the course of an election enquiry, a Court cannot go into the question how far a candidate whose name is on the electoral rolls is validly qualified to be on the rolls. The expression "election proceedings" in Rule 8 (*e*) includes also election enquiries. 47 M. L. J. 795 followed.

Where in a petition to set aside an election, the Court directed evidence to be let in challenging the successful candidate's right to be entered in the electoral rolls, it exercises a jurisdiction not vested in it by law and the order is revisable.

K. V. Krishnasami Aiyar and B. Pocker for Petitioners.

T. S. Viswanatha Aiyar for Respondents.

T. S. V.

Phillips and Odgers, JJ.
26th November, 1924. } *A. S. No.* 185 *of* 1921.

Inam—Resumption—Issue of ryotwari patta—Levy of assessment—Resumption declared ultra vires—*Suit for refund of assessment—Contract Act, Ss.* 20, 65, *Revenue Recovery Act, S.* 59 —*Bar.*

Government resumed certain *devadayam* inam villages and issued ryotwari pattas first to the hereditary trustee and later to his transferee. The latter was paying the full assessment under the patta. Subsequently in a suit by certain worshippers against the Government and the transferee, the resumption was declared invalid, whereupon the transferee sued the Government for refund of the assessment levied from him. *Held* (1) there was no mutual mistake between the parties and plaintiff having known his title depended on the validity of the resumption proceedings could not claim the relief sought for. 45 All. 179 (P.C.) ; 23 M. L. J. 746 ; 26 Mad. 268 held not applicable; (2) the issue of a patta did not amount to a con-

tract and there was no right to claim refund. 47 M. L. J. 513 ; 27 Mad. 16 referred to ; and (3) S. 59, Revenue Recovery Act, did not apply to the case. 44 M L. J. 645 followed.

The Government Pleader for Appellant.

T. M. Krishnasami Aiyar and A. Venkatachelam for Respondent.

T. S. V.

The Chief Justice and Srinivasa Aiyangar, J. *26th November,* 1924. — *O. S. A. No.* 16 *of* 1922.

Civil Procedure Code, O. 41, R. 22—Applicability—Appeals from the Original Side—Memorandum of cross-objections.

It is not competent for a respondent in an Original Side appeal to file a memorandum of cross-objections to the decree appealed against, inasmuch as O. 41, R. 22 does not apply to such appeals. But in a proper case the Court can treat it as a substantive appeal and if necessary excuse the delay in presentation under S. 5, Limitation Act.

T. Narasimha Aiyangar and T. A. Vijayaraghavachari for Appellant.

V. K. Venugopal Naidu for 1st Respondent.

Nugent Grant instructed by *V. Krishnan* for 2nd Defendant.

T. S. V

The Chief Justice and Srinivasa Aiyangar, J. *26th November,* 1924. — *O. S. A. No.* 53 *of* 1923.

Transfer of Property Act, S. 59—Deposit of title-deeds of lands in the moffusal—Deposit made in Madras—Valid mortgage effected.

Where a ryotwari patta alone of lands lying in Gudur, was deposited in Madras with intent to create a security for loans advanced, *held,* a valid equitable mortgage was created thereby.

The Advocate-General (Mr. T. R. Venkatrama Sastri.) for Appellant.

Messrs. Nugent Grant and K. S. Narayana Aiyangar instructed by *Messrs. Grant and Greatorex* for Respondent.

C. A. S.

Wallace and Madhavan Nair, JJ.
27th November, 1924.

C. M. A. No. 385 *of* 1923.
S. A. No. 1342 *of* 1923.

Partnership—Evidence of—Arrangement to share in profits—Evidence of.

An arrangement to share in the profits does not necessarily show that the person who shares such profits is a partner of the firm ; but this fact will have to be considered along with the evidence relating to the characteristics of a partnership, such as sharing of losses, etc., in arriving at a conclusion whether the parties intended to carry on business in partnership.

T. V. Muthukrishna Aiyar for Appellant.

S. Varadachariar for Respondent.

A. V. V.

Wallace and Madhavan Nair, JJ.
27th November, 1924.

Cr. A. No. 326 *of* 1924.

Penal Code, Ss. 21 *and* 353—*Public servant—Lascar of the Public Works Department—Distribution of water according to turns fixed by Department—Obstruction—Assault.*

Where a lascar of the Public Works Department of Government while engaged in the distribution of water by turns among several villages depending on a common irrigation source was obstructed and assaulted by the villagers of a particular village and it was found that the lascar was merely carrying out the orders of Government in regulating the supply of water as he did, the villagers are guilty of an offence under S. 353, Indian Penal Code. The lascar is a public servant within the meaning of S. 21, Indian Penal Code.

The Public Prosecutor for the Crown (Appellant).

B. Jagannadha Doss for Accused.

A. V. V.

Chief Justice and Srinivasa Aiyangar, J.
28th November, 1924.

A. S. No. 150 *of* 1922.

Contract—Breach—Suit for damages—Failure to take delivery—Actual custody of goods by plaintiff not necessary—Ability to deliver sufficient.

In a suit for damages for failing to take delivery of goods contracted for, the defence was that there was no valid tender as two days prior to the date of intimation plaintiff had sold the goods to another. *Held,* the fact of sale to another did not take away the liability of the defendant to accept delivery and pay the price, especially if the plaintiff was in a position to deliver the goods on the due date. Actual custody of the goods is not necessary but effective control over their disposition is sufficient. 19 L. W. 654 dissented from.

C. S. Venkatachari for Appellant.

K. Jagannatha Aiyar and *K. S. Venkatramani* for Respondent.

T. S. V.

Beasley, J.
1st December, 1924. } *I. P. No.* 367 *of* 192 .

Mortgage decree—Sale in pursuance—Insolvency of mortgagor before the date of sale in execution—Whether Insolvency Court can stay execution.

Where a mortgagee got a decree against the mortgagor and in execution of the decree brought the mortgaged properties to sale and the sale was fixed to a certain day and meanwhile the mortgagor became insolvent, *held,* the Insolvency Court had no jurisdiction to stay the sale.

K. S. Narayana Aiyangar instructed by *Messrs. Grant and Greatorex* for mortgagee.

The Official Assignee in person.

C. A. S.

END OF VOLUME XLVII.